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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~673~~. 342 69

H. T. COWLEY, APPELLANT,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

FILED NOVEMBER 7, 1891.

(14,925.)

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THE NORTHERN PACIFIC RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

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1 UNITED STATES OF AMERICA:

In the Circuit Court of the United States, District of Washington, Eastern Division.

H. T. COWLEY
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY. } In Equity.

The complainant in the above-entitled cause filed his complaint, which is hereto annexed, on the — day of ——, 1888, in the district court for the fourth judicial district of Washington Territory, holding terms at Spokane Falls, and summons was thereupon issued and returned personally served. An appearance in said court was duly entered for the defendant by Mitchell, Ashton and Chapman, their attorneys, and thereafter, to wit, on September 26th, 1888, a demurrer to the said complaint was filed in said court, the same being hereto annexed.

The said demurrer, coming on to be heard in said court, was overruled, and thereafter, to wit, on February 11, 1889, an answer to the said complaint was filed, the same being hereto annexed. On February 29th, 1889, the plaintiff filed a reply to said answer, the same being hereto annexed. Testimony was thereafter taken by the respective parties before H. D. Hinkle, referee, under an order of said district court for the fourth judicial district of Washington Territory and filed in said court, and the said order, the report

2 of the said referee, and the testimony taken by the said referee are hereunto annexed. Thereafter the cause was proceeded with in the superior court of Spokane county, State of Washington, and thereafter, on January 7th, 1890, the said defendant filed its petition, hereto annexed, in said court for the removal of the cause into the circuit court for the district of Washington, and also on the same day filed in said court bond, with sureties, as provided by law, for the removal — said cause, which said bond is also hereto annexed.

Thereafter, on, to wit, March 27th, 1890, the said superior court made an order removing said suit into the said circuit court of the United States and staying all proceedings in the said suit in the said superior court of Spokane county. Afterwards and at the April term, 1891, of the said circuit court—present, the Honorable C. H. Hanford, district judge—the said cause came on to be heard on the pleadings and proofs and was argued by counsel. On the 20th day of May, 1891, a decree of said court was filed and entered in favor of the defendant, by which it was adjudged that the complaint of plaintiff be dismissed and that the defendant have and recover of plaintiff the costs of suit, the said decree being hereto annexed.

And, the costs being taxed by the clerk at fifty-one & $\frac{40}{100}$ dollars, the process, pleadings, and decrees, together with other papers filed in said cause, are duly annexed hereto. Wherefore let the said

complaint be dismissed and the defendant recover of the said plaintiff the sum of fifty-one and $\frac{4}{100}$ dollars, the costs and charges taxed.

Signed and enrolled this 1st day of October, A. D. 1881.

A. REEVES AYERS, *Clerk*,
By L. A. WELLS, *Deputy Clerk*.

3 WASHINGTON TERRITORY, } ss.:
Spokane County, }

In the District Court in and for the 4th Judicial District of Washington, Holding Terms at Spokane Falls.

H. T. COWLEY }
vs. }
NORTHERN PACIFIC RAILROAD COMPANY. }

H. T. Cowley, plaintiff, complains of The Northern Pacific Railroad Company, defendant, a corporation organized and operating under the laws of the United States, and says that on the 29th day of June, 1886, said defendant began an action against the plaintiff herein in the district court for the 4th judicial district of Washington Territory, then holding terms for said county at Cheney, for the recovery of the possession of certain real estate situate in said county of Spokane, Washington Territory, and more particularly described in the complaint filed in said action; that afterward, on the — day of ——, 1886, the plaintiff herein filed his answer in said action, wherein he alleged in substance that he was the equitable owner of said real estate, and on the — day of ——, 188–, the
4 defendant herein filed a reply in said action to the answer, putting said cause at issue; that on the — day of April, 1887, the defendant employed the firm of Ganahl & Hagan, practicing attorneys in said court, to defend said action on his behalf and prosecute his counter-claim therein; that thereafter said Ganahl & Hagan dissolved their partnership in the practice of the law, and the said Hagan afterward and while he was still acting as the attorney of the plaintiff in said action became the law partner of Mr. S. C. Hyde, who then was and still is counsel for said railroad company, but not in said action, and said Hagan himself accepted employment from said company in some very important litigation while he was still acting as plaintiff's counsel in said cause; that said Ganahl & Hagan always advised plaintiff that his defense in said cause was a good one and could be easily established, and nothing to the contrary was ever intimated by them or either of them until the 10th day of May, 1888, when the parties had met at the office of Emma Thompson, the referee appointed by the court to take testimony in said cause, at which time his said attorneys told the said Cowley that they had a proposition of compromise
5 from said railroad company, and that he would better take it, as there was a question of estoppel in the case that would certainly defeat him, and demanded that he should accept said

proposition at once; that although all the facts of said case had been laid before said Ganahl & Hagan, including those upon which the alleged estoppel was supposed to exist, no intimation had ever been given defendant by them that anything like an estoppel stood in the way of his recovery in said cause; that as a matter of fact, although said case had been at issue for a long time, no estoppel was then or ever had been pleaded in said cause by said railroad company, and no issue was ever formed therein under which the facts constituting the alleged estoppel could be given in evidence, although said facts had been known to and in the possession of said company's officials, representatives, and attorneys, and as fully known by them as by the plaintiff, for a number of years.

Plaintiff further alleges that it is true that the defendant, through Paul Schulze, the general agent of the land department, did, on the 10th day of May, 1888, make certain oral propositions to compromise said suit, which were taken under consideration by
6 said Cowley, but said Schulze, upon demand, refused to reduce said proposition to writing at that time, and professed to be ready to put the same in writing and fully perform the same at the city of Spokane Falls on the 16th day of May, 1888; that the property in controversy in said suit was then and is now of the value of $120,000.00, and the proposition of compromise made by the company as aforesaid would have given the plaintiff herein $15,000.00 in money and property, and no more; that after full and mature consideration of said proposition said Cowley determined to reject the same, and so notified his attorneys, Ganahl & Hagan, and being very anxious about having said cause prosecuted to a final and successful issue in the courts, and being desirous of having his case tried by attorneys having confidence in the merits thereof, he determined to associate other counsel with said Ganahl & Hagan in the defense of said cause, and so notified them, asking that such other counsel should take an equal share with said Ganahl & Hagan in the conduct and responsibility of the defense of said cause; this proposition said Ganahl & Hagan utterly rejected and informed said Cowley that they were
7 in said case and proposed to stay in it, and if it was tried they proposed to try it, still asserting their inability to win the case; that thereupon said Cowley determined to dispense with the services of said Ganahl & Hagan in the defense of said cause and give the entire control and management thereof to other attorneys, and on the 17th day of May, 1888, served a written notice to that effect upon said Ganahl & Hagan, and on the same day mailed letters in the United States mail, addressed respectively to each, to said Paul Schulze and John H. Mitchell, of counsel for said company in said cause, at Tacoma, Washington Territory, their place of residence and post-office address, the said Mitchell being the only attorney of said company then in said Territory actively engaged in said cause; that in said letters, which were respectively received in due course of mail not later than May 19th, 1888, by said Mitchell and Schulze, they were notified of said Cowley's intention to discharge said Ganahl & Ha-

gan as his attorneys in said cause, and that said proposition for the compromise thereof so made by said Schulze as aforesaid had not been accepted.

Plaintiff further avers that on the 13th day of May, 1888, he notified the defendant by telegram, through its said land
8 agent, Paul Schulze, at Tacoma, that he must have further time to consider said propositions of compromise, which telegram was received by said Schulze in due time, on said 15th day of May; that on the 17th day of May, 1888, said Ganahl & Hagan notified said Cowley that upon their motion the case had been set down for the hearing of testimony on Monday, May 21st, 1888, at one o'clock p. m., before said referee, and on the 18th day of May, 1888, said Emma Thomson, referee as aforesaid, caused a like written notice to be served upon said Cowley in person, the same being directed to James McNaught and J. H. Mitchell, Jr., attorneys for plaintiff, and Messrs. Ganahl & Hagan, attorneys for defendant; that thereupon, on the same day, to wit, May 18th, 1888, said Cowley notified said Mitchell, as such attorney, by telegram, at Tacoma, that he could not take testimony in said cause on Monday, May 21st, 1888, and that he had changed attorneys therein; and on the same day, viz., May 18th, 1888, said Cowley received, in answer to said telegram, a telegram from said Mitchell, at Tacoma, as such attorney, informing him that Mr. Schulze, his principal witness, had made engagements making it impossible for him to go to Spokane Falls in said case for several weeks and that said
9 case would not go on until he (Schulze) could go, and he (Cowley) could depend on that.

And plaintiff further charges that on the 21st day of May, 1888, the same being the first day of the May term, 1888, of said court for said county, then holding terms at the city of Spokane Falls, the said Mitchell, as the attorney of said company, and the said Ganahl & Hagan, in the afternoon of that day, appeared in said court, and, in fraud of said Cowley's rights, filed in said cause a written stipulation or agreement of compromise and settlement of said cause, giving said Cowley about seven and one-half acres of the hundred and twenty acres of land in controversy in said suit, of the value of $7,000.00, and eight thousand dollars in money, and giving said railroad company the rest of said land, of the value of $113,000.00; that upon the motion of said Mitchell, as the company's attorney, the said court then and there made and entered a final order and decree in said cause in accordance with said written stipulation, but without the knowledge or consent of said Cowley, which order and decree are of the following tenor, to wit:

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
H. T. COWLEY, Defendant.

10 This cause having been brought on this day to be tried on the stipulation of the respective parties, by their respective counsel, herein, heretofore filed herein, and it appearing to the court, from the acknowledgment of satisfaction filed herein, that the terms

of said stipulation and settlement therein mentioned have been fully complied with and full satisfaction made thereof, and the court being otherwise fully advised in the premises, it is considered, ordered, and adjudged and decreed by the court, in accordance with said stipulation and the settlement mentioned therein, that the plaintiff do have and recover of the defendant the possession of the premises described in the complaint herein, to wit:

The east half of the northeast quarter (E. ½ N. E. ¼) and northeast quarter of southeast quarter of section nineteen, in township twenty-five (25) north, range forty-three (43) east, of Willamette meridian, excepting that portion of said property described as follows: A tract of land beginning at a point on the continuation of the south line of East Sixth street seventy-five (75) feet east of *of* the northeast corner of block number ninety (90), in the Second addition to the Railroad addition to the town (now city) of Spokane Falls, thence east on a continuation of said south line of East Sixth street four hundred and sixty-five (465) feet, more or less, to
11 the line dividing sections nineteen (19) and twenty (20), in township twenty-five (25) north, range forty-three (43) east, of Willamette meridian; thence south along said section line six hundred and seventy-five (675) feet, more or less; thence west parallel with said continuation of East Sixth street four hundred and fifty-three (453) feet, more or less, to a point on the continuation of the north line of East Eighth (8th) street seventy-five (75) feet east of southeast corner of block ninety-nine (99), in said addition to Spokane Falls; thence north parallel with east line of block-ninety-nine (99) and ninety (90) to the point of beginning.

The same having been contracted for sale by said plaintiff to defendant by the terms of certificate of sale mentioned in the aforesaid stipulation, with the reservation mentioned in said certificate of sale, and that a writ of restitution of this court issue restoring the said plaintiff forthwith to the possession of said lands herein first above mentioned; and it is further ordered, adjudged, and decreed that the relief prayed for in defendant's answer be, and hereby now is, denied and refused, and that the defendant do not have and maintain the same or any part thereof, and that plaintiff pay the costs of this action, taxed at — dollars.

Dated at Spokane Falls May 21st, 1888.

12 The plaintiff further says he has never received or accepted any of the proceeds of said alleged compromise nor confirmed or authorized the terms thereof in any manner whatever; that said Ganahl & Hagan nor either of them, had any authority whatever to file said written stipulation or consent to the filing thereof, nor had they or either of them any authority to consent to the entry of said order or to act for said Cowley in said cause in any manner whatever after the 17th day of May, 1888, nor had they or either of them any authority whatever to execute said written stipulation, and the same was fraudulently and corruptly executed by said Ganahl & Hagan and the said Mitchell as said company's

attorney without the knowledge or consent of said Cowley and against his will and in fraud of his rights.

And plaintiff further charges that prior to the commencement of said action as aforesaid he retained the Honorable L. B. Nash, the judge of said court, who made and entered said final order and decree in said cause as aforesaid, but who was then a practicing attorney at the bar of said court, and laid the facts of said case fully before him and advised with him concerning his legal rights
13 as against said company and as they were involved in said cause, and that for his services in that behalf said Cowley paid said L. B. Nash the sum of fifty dollars; that said Nash, having recently come to the bench of said court, did not know at the time of the making and entry of said final order and decree that the facts and property involved in said cause were the same about which he had advised said Cowley before said action was brought as aforesaid.

And the plaintiff further says that, relying upon the said Honorable L. B. Nash's former connection with the matters in controversy in said cause as above set forth, and further relying upon the fact that said Ganahl & Hagan and said referee had given said Cowley notice that the taking of testimony in said cause would be resumed before referee at one o'clock in the afternoon of May 21st, 1888, and further relying upon the statement of said Mitchell's telegram that said case would not go on until he (Schulze) can go, and still further relying upon the fact that said Ganahl & Hagan had no authority to act for said Cowley in any capacity whatever, of which fact said Mitchell, as said company's attorney, had been duly notified, said Cowley had no knowledge or information that said
14 Ganahl & Hagan, or either of them, or said Mitchell had any intention of filing any stipulation asking the court for a final order or decree in said cause on the 21st day of May, 1888, nor had he any reason or cause to suspect any such thing.

And so the plaintiff charges:

1st. That said final order and decree was made and entered without his authority, knowledge, or consent, and without the authority, knowledge, or consent of any one authorized to bind him in that behalf; and,

2nd. That said final order and decree was procured by said railroad company through the fraud and collusion of its said attorney, John H. Mitchell, and said Ganahl & Hagan, as shown by the facts hereinbefore set forth.

The plaintiff further alleges that the following facts, which he avers are true, constituted and now constitute his defense to said action and his counter-claim therein, that is to say:

On the 2d day of February, 1876, the defendant herein being the owner of the lands described in the complaint in said action, to wit, the east half of the northeast quarter and the northeast quarter of the southeast quarter of section number nineteen (19), in township number twenty-five (25) north, range forty-three (43) east of Willamette meridian, in the county of Spokane, Washington

Territory, issued and sent to the plaintiff herein its
15 certain writing duly signed and executed, wherein and whereby it invited the plaintiff to apply to it to purchase the lands above described, promising to place said application on file and note the date of the application and description of such lands in its tract book, and in said writing referred to its certain printed blank form of acceptance of said application and calling attention to the conditions of said blank form of acceptance, and promising the plaintiff that if he would apply to purchase said land, as aforesaid, it would accept his application in the form mentioned, duly filled out and signed and executed, and that upon the compliance by the plaintiff with the conditions therein set forth he should thereby acquire the preference right to purchase said lands from the defendant when the same were earned and placed on the market, and that the price of said lands should then be fixed at their value in a wild state. The plaintiff then and there accepted the invitation, terms, and premises of the defendant contained in its said writing, and the conditions of said blank form of acceptance of application, and pursuant thereto, afterward, on the — day of February, 1876, sent to the defendant his written application to purchase said lands duly signed by him, and on March 13,
16 1876, defendant duly received said application, and filed the same in its possession, and noted the date thereof, together with a description of the lands applied for (being the same hereinbefore mentioned and described) in its tract book, and on said last-named date it executed and delivered to the plaintiff its written and printed acceptance thereof, wherein and whereby it promised and agreed that upon such *bona fide* settlement upon or improvement of said lands as to evidence his intention to purchase the same, the plaintiff should have the right to purchase said lands at their value in a wild state when they should be earned. Afterward, in March, 1876, the plaintiff received said acceptance, and thereupon, in pursuance of the promises of the defendant contained in said written acceptance and said writing so issued by the defendant to the plaintiff, as aforesaid, the plaintiff entered upon and took possession of said lands with his family, and in good faith settled thereon, and made lasting and valuable improvements thereon of the value of $1,500.00, and cultivated a portion thereof, and ever since has cultivated, and now does cultivate and improve the same, and for a long space of time thereafter, to wit, until January, 1877, the plaintiff resided upon said lands as his home, at which time he built a dwelling-house partially upon said land and partially on land
17 belonging to the United States, and then moved into and ever since has and now does occupy the same as his home. The plaintiff has in all things fully performed on his part all the terms and conditions of the defendant's said written invitation to purchase said lands as well as the terms and conditions of the defendant's said acceptance of the plaintiff's application to purchase the same. In the year 1881 said lands were earned and placed on the marked by the defendant at the price of $2.60 per acre, which price was their reasonable value

in a wild state at that time, and afterward plaintiff demanded of the defendant that it should perform its contract and complete the sale to him of said lands, and thereupon tendered the defendant the price and value of said lands in a wild state, namely, $2.60 per acre in cash for the whole of said lands. The defendant then and there refused to further perform said contract or to receive said money or any part thereof, but notwithstanding such refusal and failure on the part of the defendant to perform said contract on its part, the plaintiff has ever since said tender, and at all times and places proper and requisite, stood ready, willing, and able to perform said contract on his part and had repeatedly before the bringing of said
18 action by the defendant as aforesaid against the plaintiff tendered to perform the same, and did, upon the filing of his answer in said action, pay into court for the use and benefit of the plaintiff therein the purchase price and value of said lands, to wit, the sum of $312.00, where the same still remains subject to the acceptance and order of said railroad company. The defendant, ever since said lands were earned and placed on the market as aforesaid, has refused and still does refuse to perform said contract on its part. The defendant, at divers times before the bringing of said action against the plaintiff as aforesaid by its agents and employees, did, without the consent and against the will of the plaintiff, enter upon and attempt to possess and hold a large portion of said land, and did *to* attempt to exercise acts of dominion over the same against the will and protest of the plaintiff and to his great damage. In the year 1881 the defendant had fully performed all of the conditions of its grant of said land from the United States, and had in all things fully complied with said grant and then and there became entitled to a patent therefor from its said grantor and ever since has remained and now is so entitled to a patent therefor.

And the plaintiff further says that he is ready and able to establish the foregoing facts of his defense and counter-claim in
19 said action by sufficient legal evidence if said final order and decree be set aside and he be allowed to defend said action.

Wherefore he asks that said order and decree be wholly set aside, annulled, and held for naught, and that he be allowed to defend said action, and that he have judgment for costs and all other proper relief in the premises.

BLAKE & RIDPATH,
Att'ys for Plaintiff.

WASHINGTON TERRITORY, } ss:
Spokane County, }

H. T. Cowley, being first duly sworn, upon his oath says that he has heard the foregoing complaint read over and knows the contents thereof and believes the same to be true; he further says that he is the plaintiff in this cause.

H. T. COWLEY.

Subscribed and sworn to before me this 26th day of June, 1888.

J. M. MAJOR,
Notary Public, W. T.

[SEAL.]

20 [Endorsed:] H. T. Cowley *vs.* N. P. R. R. Co. Copy complaint. (Rec'd from J. M. R.) 8, 22, '88.

21 In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at Spokane Falls, in and for Spokane County.

H. T. COWLEY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. } Demurrer.

Now comes the defendant, The Northern Pacific Railroad Company, by its attorneys, and demurs to the complaint of the plaintiff herein on the ground that the same does not state facts sufficient to constitute a cause of action.

MITCHELL, ASHTON & CHAPMAN,
Attorneys for Defendant.

22 [Endorsed:] 2283. District court at Spokane Falls. H. T. Cowley *vs.* N. P. R. R. Co. Demurrer. Filed Sept. 26, 1888. D. A. Clement, clerk.

23 In the District Court of the Territory of Washington, Fourth Judicial District, Holding Terms at Spoken Falls.

H. T. COWLEY, Plaintiff,
vs.
N. P. R. R. Co., Defendant. } 2283. Demurrer to Complaint Overruled. Def'd't Excepts. Def'd't has Until Tomorrow to Move or Plead.

Now, on this day, this cause coming on to be heard on the demurrer of the defendant to plaintiff's complaint herein, the plaintiff appearing by his attorney, R. B. Blake, Esq., and the defendant appearing by J. H. Mitchell, Jr., its attorney, and the court having heard argument of counsel and having taken said matter under advisement and being fully advised in the premises, it is considered and hereby ordered that said demurrer be, and the same is hereby, overruled; to which ruling of the court defendant excepts and exception allowed.

It is further ordered that defendant have until tomorrow in which to move or plead to said complaint.

Dated Dec. 21, 1888.

WM. G. LANGFORD, *Judge.*

24 In the District Court of the Territory of Washington, 4th Judicial District, Holding Terms at Spokane Falls.

H. T. COWLEY, Plaintiff,
vs.
N. P. R. R. Co., Defendant. } Referred to J. D. Hinkle, Esq.

Now, on this day, comes the plaintiff, by his attorney, and the defendant appearing by its attorney, and in open court consent that this cause be referred to J. D. Hinkle, Esq., and the court being

fully advised in the premises, it is considered and hereby ordered that this cause be, and the same is hereby, referred to J. D. Hinkle, Esq., to settle the pleadings, take the evidence, and report law and facts as to the setting aside the judgment prayed for in plaintiff's complaint, and to require answers to interrogatories, if proper to be made.

Dated Dec. 24, 1888.

WM. G. LANGFORD, *Judge*.

25 TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

In the District Court of the Fourth Judicial District of Washington, Holding Terms at Spokane Falls.

H. T. COWLEY, Plaintiff, }
vs. } Motion.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

Now comes the defendant, The Northern Pacific Railroad Company, and moves the court for an order striking from the plaintiff's complaint the words, paragraphs, and allegations herein specified, as follows, to wit:

1st. The words "that thereafter said Ganahl & Hagan dissolved their partnership in the practice of the law."

2d. The words "and the said Hagan afterward and while he was still acting as the attorney for the plaintiff in said action became the law partner of Mr. S. C. Hyde, who then was and still is counsel for said railroad, but not in said action."

3rd. The words "and said Hagan himself accepted employment from said company in some very important litigation while he was still acting as plaintiff's counsel in said cause."

26 4th. All that portion of said complaint commencing with the words "that said Ganahl & Hagan always advised plaintiff that his defense in said case was a good one," and ending with the words "although said facts had been known to and in the possession of said company's officials, representatives, and attorneys, and as fully known by them as by the plaintiff for a number of years."

5th. All that portion of said complaint commencing with the words "and being very anxious of having said cause prosecuted to a final and successful issue in the courts," and ending with the words "served written notice to that effect upon said Ganahl & Hagan."

6th. The words "of said Cowley's intention to discharge said Ganahl & Hagan as his attorneys in said cause."

7th. All that portion of said complaint commencing with the words "that on the 17th day of May, 1888, said Ganahl & Hagan notified said Cowley that upon their motion the case had been set down for the hearing of testimony on Monday, the 21st day of May, 1888," and ending with the words "and that said case would not go on until he (Schulze) could go and he (Cowley) could depend on that."

27 8th. The words "or to act for said Cowley in said case in any manner whatever after the 17th day of May, 1888."

9th. The words "and the same was fraudulently and corruptly executed by said Ganahl & Hagan and the said Mitchell as said company's attorney."

10th. Also the words "that said final order and decree was procured by said railroad company through the fraud and collusion of its said attorney, John H. Mitchell, and said Ganahl & Hagan, as shown by the facts hereinbefore set forth."

For the reasons and upon the grounds that said words, paragraphs, and allegations, and each and all of them, are immaterial, irrelevant, and redundant.

Said defendant also moves the court for an order of the court striking from said complaint all of that portion of same commencing with the words "and plaintiff further charges that prior to the commencement of said action as aforesaid he retained the Honorable L. B. Nash, judge of said court," and ending with the words "nor had he any reason or cause to suspect any such thing."

For the reason and upon the ground that the same and each and every part thereof are immaterial, irrelevant, impertinent, and scandalous.

MITCHELL, ASHTON & CHAPMAN,
Attorneys for Defendant.

28 [Endorsed:] District court at Spokane Falls. 2283. H. T. Cowley *vs.* N. P. R. R. Co. Motion to strike. Filed Dec. 22, 1888. J. Kennedy Stout, clerk.

29 In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at Spokane Falls, in and for said County.

H. T. COWLEY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. } Answer.

Now comes the defendant, The Northern Pacific Railroad Company, and for answer to the complaint of the plaintiff herein says—

That as to whether said Ganahl and Hagan or either of them ever advised plaintiff that his defense in the cause of said company against him was a good one, as to whether they or either of them ever advised him that such defense could be easily established, as to whether they or either of them ever intimated anything to the contrary to him on the 10th day of May, 1888, or at any other time, defendant has not any knowledge or information sufficient to form a belief with respect thereto, and therefore denies the allegations made in that behalf.

As to whether the said Ganahl and Hagan or either of them ever told plaintiff that there was a question of estoppel in the case that would defeat him, as to whether they or either of them ever demanded that he should accept any proposition of said company

at once or at all, defendant has not any knowledge or information sufficient to form a belief with respect thereto, and therefore denies the allegations made in that behalf.

As to whether all of the facts of said case had been laid before said Ganoahl and Hagan or either of them, as to whether the
30 facts which were laid before them or either of them included those upon which any alleged estoppel was supposed to exist, as to whether they or either of them ever gave said Cowley any intimation that any estoppel stood in the way of his recovery in said cause, defendant has not any knowledge or information sufficient to form a belief with respect thereto, and therefore denies the allegations made in that behalf.

Defendant denies the allegation that there was never any estoppel pleaded in said cause by said railroad company; denies the allegation that there was no issue ever formed therein under which the facts constituting the alleged estoppel could be given in evidence; denies that the facts constituting said estoppel were as fully known to said company's officials, representatives, and attorneys, or any of them, as by the plaintiff; denies that said facts were ever fully known to or in the possession of said company's officials, representatives, or attorneys, or any of them, until after said action was commenced and put at issue.

Defendant denies that said Cowley ever demanded of Paul Schulze, its general land agent, that he should reduce to writing the oral propositions to compromise said suit made by him on May 10, 1888; denies that he ever refused to reduce said proposition to writing, but alleges that it is true that defendant, by its attorneys, J. H. Mitchell, Jr., on the morning of the said 10th day of May, 1888, submitted to Messrs. Ganahl and Hagan, said Cowley's attorneys, certain oral propositions or offers of compromise of said suit, which were by said Cowley's attorneys, as said Schulze was shortly thereafter informed by said Cowley, submitted to said Cowley; that said Cowley, shortly after said propositions were submitted
31 to him, called upon said Schulze and requested said Schulze to put the propositions mentioned by said Mitchell in writing; this said Schulze refused to do, as he had not seen said Mitchell after he had submitted to said Ganahl and Hagan his offers of compromise and did not know the nature or extent of said propositions and had not been able to confer with said Mitchell concerning the same, and so informed said Cowley; and said Schulze told said Cowley that he could do or say nothing in the matter until he had seen and conferred with said Mitchell in relation thereto.

That the only propositions of compromise made by said Schulze on said day were made subsequently on said day and were made direct to said Cowley and are the propositions hereinafter referred to in this answer.

Denies that said Cowley rejected the propositions of compromise of said suit made by said Schulze on behalf of said company, but alleges the fact to be that said Cowley did accept said propositions as they were made and all the terms thereof, on the same day that

they were made; that such acceptance of the same was after full and mature consideration thereof.

Denies that said Cowley notified his attorneys that he had determined to reject said propositions, but alleges the fact to be that his acceptance of the same was made known to said Schulze in the presence of Judge Albert Hagan, one of his attorneys.

As to whether said Cowley ever determined or when he determined to dispense with the services of said Ganahl and Hagan in the defense of said cause, or give the entire control and management thereof to other attorneys, and whether he ever served a written notice to that effect upon said Ganahl and Hagan, de-
32 fendant has not any knowledge or information sufficient to form a belief in relation thereto, and therefore denies the allegations made in that behalf.

Defendant admits the receipt by its general land agent, Paul Schulze, and its attorney, John H. Mitchell, Jr., of the letter referred to in the complaint as having been addressed and mailed to them respectively by the said Cowley on the said 17th day of May, 1888, but defendant alleges that said letter was not written or mailed until after all papers and all paper-writings evidencing the agreement of compromise made on the 10th day of May, 1888, between said Cowley and said railroad company through said Schulze, as its general land agent, had been fully executed by said Schulze on behalf of said company according to the terms of said agreement in every particular, and, together with the money thereby agreed to be paid, forwarded by him to and received at Spokane Falls and placed upon deposit at the place which had been agreed upon with said Cowley as the place where he could obtain the same, and the said money left payable to the order of said Cowley or his attorneys, and after he, the said Cowley, had been duly notified of the receipt of said papers and money; that the proposition of compromise mentioned in said letter as not having been accepted had been accepted on the 10th day of May previous.

Defendant admits that said Cowley notified the defendant by telegram through its land agent, Paul Schulze, that he must have further time to consider said propositions of compromise; denies that said Paul Schulze or any one connected with said company ever received any telegram sent by said Cowley on the 13th day of May, 1888, or on any day subsequent to May 10th, 1888, until May 15th, 1888; that the only propositions of compromise sub-
33 mitted to said Cowley by said Schulze on behalf of said company prior to the date of the receipt of said telegram had been previous thereto accepted by said Cowley, and no other propositions of compromise on behalf of said company had been made subsequent to the propositions submitted by said Schulze on the 10th day of May, 1888, and which were accepted by him on the same day; that there were not at the time of the receipt of the said telegrams or at any time subsequent to the 10th day of May any propositions of compromise remaining open for consideration, and there was not anything to be further considered in relation to the matter of compromise, and said Schulze so notified said Cowley in

his telegram sent on the 15th day of May in reply to the one received by him on that day.

That the paper-writings and money hereinbefore referred to had already been forwarded by said Schulze from the headquarters of said company's land office at Tacoma to Spokane Falls, as hereinbefore mentioned, before the sending or receipt of said telegram received by said Schulze on May 15, 1888, and said company, through said Schulze, had heretofore fully complied with all the terms of said agreement of compromise.

As to whether said Ganahl and Hagan ever notified said Cowley that upon their motion the said cause had been set down for hearing of testimony on Monday, May 21st, 1888, or any other day, and as to whether the referee, Emma Thomson, ever caused a notice to same effect to be served on said Cowley, defendant has not any knowledge or information sufficient to form a belief in relation thereto, and therefore denies the allegations made in that behalf.

That at the time of the said receipt be said Mitchell of the telegram sent by said Cowley to said Mitchell on May 18th,
34 1888, neither said Mitchell nor said Schulze nor any one connected with said company knew anything about any hearing for the taking of testimony in the said cause.

Defendant denies that the written stipulation of settlement filed in said cause was filed in fraud of said Cowley's rights, but alleges that it was filed in pursuance of and in full accord with the terms of the agreement of compromise entered into between said Cowley and said company, through its general land agent, Paul Schulze, on the 10th day of May, 1888, and fully in accordance with the instructions and authority given his said attorneys by said Cowley as to the manner of carrying out the terms of the agreement of settlement made by him; that said stipulation was filed and the motion of said Mitchell for judgment and decree thereon was made when the said cause was regularly reached in the order of its number on the calendar in open court on the first day of the term of court.

Defendant denies that said order or decree was made without the knowledge or consent of said Cowley, but alleges that said judgment and decree as entered are in full accord with the terms of the agreement made with said Cowley and hereinbefore referred to.

Defendant says that it is not true that said Cowley has never received any of the proceeds of said compromise, but alleges that said Cowley has been ever since the entry of said judgment and decree in the undisturbed possession of the seven and one-half acres of land set apart to him by the terms of said order and decree, and that the money by said compromise agreed to be paid has remained ever since said judgment and decree on deposit at the place where the said Cowley directed it to be left, unless said Cowley has removed it from said place and made use of it.

35 Defendant says it is not true that said Cowley did not confirm or authorize the terms of said compromise, but alleges that each and every one of the terms of said compromise were fully authorized and approved by said Cowley.

Defendant says that it is not true that said Ganahl and Hagan

had no authority to file said written stipulation or consent to the filing thereof, or to consent to the entry of said order or decree, or to act for said Cowley after said 17th day of May, 1888, or to execute said stipulation; but alleges that express authority and consent were given them by Cowley for these very purposes; denies that said stipulation was fraudulently or corruptly executed by said Ganahl and Hagan or by the said Mitchell or by either or any of them. Defendant says it is not true that it was executed without his knowledge or consent or against his will or in fraud of his rights.

Defendant says it is not true that said Cowley had no knowledge or information that said Ganahl and Hagan or either of them or said Mitchell had any intention of filing any stipulation asking the court for a final order or decree in the said cause, but alleges that the same was done by the direction and express wish of said Cowley himself.

Defendant denies each and every allegation contained in the first and second specifications of charges designated as what the plaintiff charges.

And for answer to the allegations alleged as constituting said Cowley's defense to said action, this defendant denies each and every one of said allegations except that on the 2d day of February,

36 the defendant was the owner of the lands described in the complaint of said company against said Cowley.

And for a further and affirmative answer to the complaint of said Cowley in this case the defendant alleges:

First.

That on the 10th day of May, 1888, Paul Schulze was a duly authorized general land agent of the defendant, having direct supervision over its land matters in Oregon, Idaho, and Washington, and had full authority on that day to make settlement of the controversy involved in the litigation then pending between said Cowley and said company relative to the lands hereinbefore referred to; that on the morning of said day, which was the day set by the referee in the cause of the company against said Cowley for the taking of testimony therein, the said Schulze had arrived in the city of Spokane Falls, the place of taking said testimony, as a witness on behalf of said company in said case, and said J. H. Mitchell, Jr., said company's attorney in said cause, had arrived there on the same morning to look after said company's interests in said cause; that shortly after their arrival and before the time appointed for said hearing said Mitchell made certain propositions of compromise of said suit to Messrs. Ganahl and Hagan, attorneys for said Cowley; that afterwards, later in said day, said Schulze and said Cowley met and talked over the matter of compromise of said suit, and said Cowley asked for further time within which to consider the propositions announced by said Schulze on behalf of said company as those it was willing to make and did make; that the taking of testimony was thereupon, by consent of all parties in interest, postponed until the next day; that during the entire afternoon of said

day and until late in the evening of said day said Cowley,
37 together with his wife and his attorneys, had said offers of compromise under consideration; that late on the evening of said day, just as said Schulze and Mitchell were about to retire for the night, the said Cowley sent for them to go with him and his attorney to said Cowley's house; that thereupon said Schulze and Mitchell were taken to the place where said Cowley was waiting for them and conducted by him, together with his attorney, Judge Albert Hagan, to his house; that upon the arrival at his house Mr. Schulze made known to Mr. Cowley, in the presence of his family and his attorney, the offer of compromise which he made on behalf of said company; that the offer as then and there made and the settlement as then and there proposed by said Schulze on behalf of said company was accepted by said Cowley in the presence of all the parties hereinbefore referred to as being present and all of its terms fully acquiesced in; that in order to make the terms of said settlement fully understood by all parties the said Schulze stated them fully and clearly several times, and as often as they were stated they were fully and carefully considered by said Cowley and acquiesced in and accepted by him. The said settlement was thereupon finally, definitely, and satisfactorily agreed upon between said Cowley and said Schulze, acting for said company. It was agreed by the terms thereof that there should be given and relinquished by the company to said Cowley the tract of land on which the house in which said Cowley and family lived, and on which the outhouses and appurtenant buildings and improvements connected with his house were situated, consisting of about seven and one-half acres of land, being a part of the land in dispute, and that said company should pay him in addition thereto the sum of eight thousand dollars ($8,000.00); that
38 in consideration of the same he was to relinquish to said company all of the remaining portion of the land in dispute; that thereupon the said Albert Hagan was directed and authorized by said Cowley to enter into a stipulation with said J. H. Mitchell, Jr., in the case then pending, covering and carrying out the terms of the said settlement, and the said Schulze then and there directed and authorized said Mitchell to join in a stipulation with said Hagan to the same effect; that thereupon, in the presence and hearing of and with the assent and consent of said Schulze and Cowley, respectively, the said Hagan and Mitchell talked over and agreed upon the general plan and outline of said stipulation, then and there agreeing that said stipulation, in addition to containing the terms of said settlement, should provide for the payment of the costs of said cause by said railroad company, and it was then and there agreed between the said attorneys of said parties themselves that all proceedings for the taking of testimony in said cause should be at an end, and that the order and understanding previously had for the taking of testimony on the next day was then and there considered vacated and declared of no further or binding force on any of the parties; that *he* said agreement of settlement the papers evidencing the relinquishment and giving of said seven and one-

half acres should be placed by said Schulze at the First National Bank of Spokane Falls, together with said eight thousand dollars, on the 16th day of May, 1888, payable to the order of said Cowley or his attorneys.

That said papers and said money were placed there on that day and said Cowley duly notified on the same day; that in all respects the terms of said agreement of settlement were fully and faithfully complied with by said company; that, the said Schulze and
39 Mitchell having left Spokane Falls for Tacoma on the same night that the settlement was made, the said Hagan, as attorney for the said Cowley, reduced to writing a memorandum of the terms of said settlement as made on said night, the substance of which memorandum was shortly afterward embodied in the stipulation which was signed by said Mitchell and said Ganahl and Hagan; that said stipulation was and is the same that was filed in said cause, and the same was filed at the first opportunity on which any action of the court could be obtained on the same after the making of said settlement; that said stipulation was filed in accordance with the directions and authority given at the time of the making of said settlement as aforesaid, and the terms of the settlement referred to therein are the same as were agreed upon between said Cowley and said Schulze on the night of May 10th, 1888; that said judgment and decree *was* entered in pursuance of said stipulation, and the terms of settlement recited therein are the same as agreed upon between said parties, and the provisions of said judgment are as authorized and directed by said agreement to be made; that said judgment and decree were not entered until the judge of said court was fully satisfied and due proofs had been given him that the terms of said settlement had been fully complied with and fully performed on the part of said railroad company.

And defendant alleges that it has fully performed and faithfully kept the terms and provisions of said agreement, and that it has never withdrawn or removed the money or papers placed at the First National Bank of Spokane Falls according to the terms of said agreement, and that the same *I*re now there, subject to the acceptance at any time of said Cowley.

40 Second.

And for a further and affirmative defense by way of answer to the allegations alleged as constituting a defense to the action of said company against said Cowley defendant alleges—

That said Cowley never settled upon or improved any of the land mentioned in his complaint under faith of any circular or invitation of said company; that during all the time that said Cowley claims to have been upon that and adjoining land, prior to the year 1883, eighty acres of the same, to wit, the southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter of said section nine, were, together with the southwest quarter of the northeast quarter and the northwest quarter of southeast quarter of said section, occupied and claimed by an Indian by the name of

Enoch Siliquowya, one of the Spokane tribe of Indians, who had settled upon and made all the improvements upon the same and was during all of said time occupying the same as his house. Prior to the year 1883 said Cowley claimed to have purchased from another white man, who had purchased from said Indian, the forty acres now claimed by said Cowley and not included in the eighty acres mentioned as having been occupied by said Indian prior to 1883, which said forty acres *is* described as the northeast quarter of the northeast quarter of said section; that when said Cowley first located in the vicinity of said land and came among said Spokane Indians it was in the capacity as agent and missionary to said Indians; that when he came there the said Enoch Siliquowya had about one hundred and seventy acres of said land cleared and let him live on a tract of about twenty acres of the same; that during
41 nearly all the time between the time when the said Cowley first located in the vicinity of said land and the year 1882 he was claiming his residence and improvements as being upon a portion of the section adjoining the land in controversy and made entry of the same in the United States land office of the land district in which said lands were situated as a homestead under the homestead laws of the United States, based upon a settlement and residence and improvements upon said portion of said section, and afterward entered as an additional homestead in the same way under the same laws an additional portion of said section; that afterwards he induced the United States Government, upon the faith of said alleged settlement, cultivation, improvements, and continuous residence thereon, to issue him a patent therefor; that during all the time prior to the year 1883 the said Cowley was acting as agent of the said Indian, Enoch Siliquoywa, in attempting to procure for him an entry of said eighty acres of the land described in the complaint under the provisions of what is known as the Indian homestead act, and represented to the United States Land Office that said Indian had severed his tribal relations and was fully qualified to enter said land under the provisions of said act; that in the early part of the year 1882 and at frequent intervals between that time and the year 1883, after it had been definitely ascertained that the land now in controversy was included within an odd section which had fallen within the grant to said company, the said Cowley wrote, addressed, and mailed to the then Commissioner of Indian Affairs and to various officers of the Department of the Interior of the United States letters setting forth what he claimed to be the injustice of the said company in endeavoring to dispossess the said Indian Siliquowya of the land on which the said Indian was then residing as his home, being the land hereinbefore referred to and including
42 eighty acres of the land now in controversy, without paying him adequate compensation therefor, which said letters were duly received by the persons to whom they were respectively addressed; that on the 7th day of April, 1882, the said Cowley wrote to the Hon. Hiram Price, the then Commissioner of Indian Affairs, a letter addressed to him at Washington, D. C., where the same was duly received by him, appealing to him to interfere on behalf of the

Government as between said Indian and said company and to make some provision to equitably meet the case of said Indian and to compel said company to do him adequate justice; that in said letter he represented to said Commissioner that the amount offered said Indian by said company, to wit, the sum of two thousand dollars ($2,000.00), while sufficient to compensate him for his improvements, did not allow him anything for his lands, a copy of which said letter is attached hereto and marked "Exhibit A" and made a part of this answer; that not until the early part of the year 1883 and not until after said Cowley had learned that said company had settled with said Indian by paying him the sum of two thousand dollars for said lands, which said sum was paid in pursuance and by reason of the representations of said Cowley made as aforesaid, did the said Cowley for himself or any one on his behalf ever make any claim of any interest in said lands or any part thereof; that said Cowley had prior thereto, by his conduct and representations, given the said company and its agents and officials every reason to believe that he claimed no interest therein, and defendant alleges that he is now estopped by said conduct and representations from claiming any interest or right thereto.

43 Wherefore defendant prays that the plaintiff may not have the relief prayed for in his complaint, and that it may go hence without day and have judgment for its costs and disbursements herein.

MITCHELL, ASHTON & CHAPMAN,
Attorneys for Defendant.

EXHIBIT "A."

SPOKANE FALLS, W. T., *Apr.* 7, 1882.

Hon. Hiram Price, Com. Ind. Affairs, Washington, D. C.

DEAR SIR: The case of an Indian in which law defeats its own object—*i. e.*, of securing justice to the weak—is before you, and is so distressing that I am urged to present it to you with the hope that you will be able to do something to alleviate the rank injustice by which he is threatened.

Enoch Siliquowya, of the Spokane tribe, has occupied and cultivated S. ½ of N. E. ¼ and N. ½ of S. E. ¼ of sec. 19, t'p 25 N., of R. 43 E., for about eighteen years. He has fenced portions of it four times, and twice enclosed something over 160 acres. He has a good log cabin, three barns, root-house, and wood shed. He makes it his home, and has always remained on it, a pioneer among his people in the cultivation of the soil. Since my residence of eight years in his neighborhood he has been an industrious, upright, exemplary man, in many respects superior to white men in the locality, and has done more than any other individual in this region for the support of a school among his people.

44 His influence has been salutary in the preservation of peace between Indians and whites during the exciting times of the Nez Perces and Bannock wars, and he has been a help in the settlement of this region by the whites.

He has made two efforts to enter his lands under the Ind. homestead act, but its being on an odd section contiguous to the N. P. R. R. has caused the rejection of his application. The circumstances of his case were carefully presented to Col. Watkins in '77, to Col. Wood and Pollock in '80, and recently, I understand, by Ag't Simms to your dep't, to all of which as yet we have had no response.

The railroad company are now anxious to have possession of this land for the purpose of laying it off into town lots, in which shape its value would be about $10,000. They offer him $1,000 for his improvements, which is a liberal allowance, but do not see how they can allow him anything for the land. The case is aggravated by the fact that a relative has recently had title granted to a whole section of railroad land in the vicinity—a donation claim—and another—a Coner d'Alene—has just secured his title to his homestead on an odd section by the relinquishment of the railroad Co. of its legal rights.

Enoch has become aware of the high value of his land, and naturally is unwilling not only to accept such a small allowance for his right, but to feel that he must be dispossessed by law, that he must be driven out after all these years of toil and well-earned possession.

This matter has an important bearing on the action of the Spokan-s in taking up land in severalty. The disposition of Enoch in this matter will act discouragingly on those yet undecided, as he is a universal favorite with his people, and all will share with him the sense of injustice of this act. I trust that some relief may be afforded in this impending wrong. Of course it will be better for Enoch to have his farm some distance from this thoroughfare, but his removal ought not to be compulsory, and ample remuneration ought to be allowed to him. Cannot some provision be made to equitably meet his case?

Very respectfully, H. T. COWLEY.

TERRITORY OF WASHINGTON, }
County of Pierce, } *ss*:

Paul Schulze, being first duly sworn, upon oath deposes and says that he is the general land agent of The Northern Pacific Railroad Company, the defendant named in the above-entitled action; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

PAUL SCHULZE.

Subscribed and sworn to before me this 7th day of February, 1889.

JOHN H. MITCHELL, Jr.,
Notary Public in and for the Territory of Washington.

[Endorsed:] Answer. Filed Feb'y 11th, 1889. J. D. Hinkle, referee.

46 In the District Court of Washington Territory and for the Fourth Judicial District Thereof, Holding Terms at Spokane Falls.

H. T. COWLEY, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The plaintiff, for a reply to the defendant's answer, says that he denies all and singular the allegations in said answer that on May 10th, 1888, or at any other time he accepted any proposition of compromise or settlement or settled or compromised said action of said company against him with said company through said Paul Schulze or any other person, but alleges that propositions of compromise and settlement thereof were pending between him and said Schulze, representing said company, from May 10, 1888, to May 16, 1888, at which latter date said Cowley refused any further consideration of said propositions.

As to what paper-writings or money the defendant sent to the First National Bank of Spokane Falls or any other place prior to May 17, 1888, or to whom any money was left payable at any such place, the plaintiff has no knowledge or information sufficient to form a belief, and therefore denies the allegations made in that behalf.

The plaintiff denied that there was not any proposition of compromise remaining open between him and said company after May 10, 1888.

47 Plaintiff denies that said written stipulation of compromise was filed in said cause in pursuance of or in accord with any agreement made by said Cowley with said company through said Schulze or any other person.

Plaintiff denies that said Ganahl and Hagan or either of them had any authoritity to make or file said written stipulation in said cause or consent to said judgment.

Plaintiff denies that said judgment was entered with plaintiff's knowledge or consent or in accord with any agreement made by him.

Plaintiff denies that he has ever received any of the proceeds of said judgment or compromise or that he is or has been in the possession of said real estate under the same, but alleges that he holds possession of the same under his original agreement with said company for the purchase thereof, as stated in the complaint.

Plaintiff denies that said Hagan and said Mitchell, with his knowledge or consent, ever talked over the plan or outline of said stipulation or had they any authority in that behalf.

Plaintiff denies that said judgment was not entered until proof was made that the terms of said stipulation had been complied with and performed on the part of said company, but alleges that the terms of said stipulation were not and never have been complied with by said company.

Plaintiff further says that it is not true that prior to the year 1883 the southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter of said section nineteen was occu-

pied exclusively by said Enoch Silifouwya or that he made all the improvements on the same, but alleges that the improvements mentioned and set forth in his complaint were all made by the plaintiff, as therein alleged.

48 Plaintiff denies that he ever claimed that his residence or improvements were wholly upon the land entered by him a- a homestead or that he ever acted as the agent of said Enoch in attempting to procure for him an entry of *said* eighty acres of land as a homestead under the Indian homestead act.

Plaintiff admits that he wrote the letter to Hiram Price, Commissioner of Indian Affairs, dated April 7, 1882, a copy of which is set forth in defendant's answer, but denies that he wrote any other letters or letter to said Commissioner or to any other officer of any department of the Government of the United States touching the subject of said letter exhibited in the answer, or in which he claimed that said company was guilty of injustice in tryin- to dispossess said Enoch of said land. He also denies that in said letter of April 7, 1882, he appealed to said Commissioner to interfere on behalf of the Government as between said Indian and said company, or that he appealed to said Commissioner to compel said company to do said Enoch justice, but alleges that in said letter he asked and appealed to the authorities of the Government to render said Indian some pecuniary relief.

Plaintiff says it is not true that he did not claim any interest in the said land or any p-rt thereof until the early part of the year 1883, but alleges that there has been no time since March 13th, 1876, when he has not been claiming all said real estate under his agreement with said company to purchase the same, as set forth in the complaint.

Plaintiff says that it is not true that at any time he, by his conduct or representations, or in any other manner, gave said company or its agents or officers any reason to believe that he

49 claimed no interest in said real estate, but on the contrary has at all times notified them and given them to understand that he was claiming the whole of said land under his agreement and contract aforesaid.

Wherefore he asks judgment as demanded in the complaint and all proper relief.

BLAKE & RIDPATH,
Attorneys for Plaintiff.

WASHINGTON TERRITORY, } ss:
County of Spokane, }

H. T. Cowley, being first duly sworn, — that he is the plaintiff in this cause and has heard the foregoing reply read over and knows the contents thereof and the statements therein contained, and believes the same to be true, and further saith not.

H. T. COWLEY.

Subscribed and sworn to before me this 19th day of February, 1889.

J. M. MAJOR,
Notary Public, W. T.

[Endorsed:] Reply. Filed Feb'y 29th, 1889. J. D. Hinkle, referee.

50 WASHINGTON TERRITORY, } ss:
Spokane County, }

Sheriff's Amended Return.

I, Jeroes Glispin, sheriff of Spokane county, Washington Territory, do hereby certify that I personally served the within summons on the within-named defendant, The Northern Pacific Railroad Company, by leaving with and handing to Harry G. Stimmel, the station and ticket agent of said defendant at the city of Spokane Falls, in said county and Territory, on the 21st day of July, 1888, at and in said county and Territory, a true, correct, and certified copy of the within summons. This amended return is made under an order of the judge of said district court made at chambers.

Dated Aug. 31st, 1888.

JAMES GLISPIN,
Sheriff of Spokane County, W. T.

[Endorsed:] No. 2283.
[Endorsed:] No. 2283. Filed this return September 1st, 1888. D. A. Clement, clerk, by Chas. B. Johnston, deputy.

51 TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

In the District Court of the Territory of Washington and for the Fourth Judicial District Thereof, Holding Terms at Spokane Falls, Spokane County, in Said Territory.

H. T. COWLEY, Plaintiff, }
vs. }
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

To the above-named defendant:

You are hereby requested to appear in the district court of the fourth judicial district, holding terms at Spokane Falls, within twenty days after the service of this summons, exclusive of the day of service, if served in the above county; if not served in said county, but in said district, in thirty days; if served in any other judicial district in the Territory, in forty days, and answer the complaint of the above-named plaintiff now on file in the office of the clerk of said court; and unless you so appear and answer the same will be taken as confessed and the prayer thereof granted.

[SEAL.] Witness my hand and seal of said court this 21st day of July, 1888.

D. A. CLEMENT, *Clerk,*
By A. S. JOHNSTON, *Deputy.*

BLAKE & RIDPATH,
Attorneys for Plaintiff.

52 [Endorsed:] (Original.) Case No. 2283. Summons. (Personal service.) In the district court of the Territory of Washington and for the fourth judicial district thereof, holding terms at Spokane Falls, Spokane county, in said Territory. H. T. Cowley, pl'tff, *vs.* N. P. R. R. Co., defendant. Returned and filed this 23rd day of July, A. D. 1888. D. A. Clement, clerk, by A. S. Johnston, deputy. Summons ret'd & filed Sept. 1, 1888. D. A. Clement, clerk, by A. S. Johnston, deputy.

TERRITORY OF WASHINGTON, }
County of Spokane, } *ss.:*

I, James Glispin, sheriff of Spokane county, Washington Territory, do hereby certify that I served the within summons on the within-named defendant, The Northern Pacific Railroad Company, by leaving with and handing to Harry Stimmel, the now acting agent of said company, a true and certified copy of the within summons in Spokane county, Washington Territory, on the 21st day of July, A. D. 1888, by then and there delivering to said defendant personally a copy of said summons.

JAMES GLISPIN,
Sheriff of Spokane County, W. T.

Sheriff's fees.

Serving summons	$1 00
Mileage, — miles	20
Total	$1 20

53 In the District Court of Washington Territory for the Fourth Judicial District, Holding Terms at Spokane Falls.

H. T. COWLEY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

This cause coming on to be heard on the motion by defendant to quash the service of summons herein, J. M. Kinnaird appearing for the motion, and Mr. Blake, of counsel for plaintiff, appearing and confessing said motion, it is therefore ordered that said service be, and the same is hereby, quashed and held to be of no effect, and, on motion of plaintiff, sheriff is granted leave to amend his return.

Done in chambers this 30th day of July, 1888.

NASH, *Judge.*

[Endorsed:] H. T. Cowley, pl'ff, *vs.* N. P. R. R. Co., def't. Order. Filed Aug. 30, 1888. D. A. Clement, clerk, by Chas. B. Johnston, deputy.

54 WASHINGTON TERRITORY, } ss:
Spokane County, }

In the District Court of Washington Territory and for the 4th District Thereof, Holding Terms at Spokane Falls.

H. T. COWLEY, Plaintiff, }
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

To the clerk of said district court:

You will please issue another summons in the above-entitled cause against and to The Northern Pacific Railroad Company, defendant, sitting forth in said summons all the facts and statements required by law.

BLAKE & RIDPATH,
Att'ys for Plaintiff.

55 [Endorsed:] 2283. H. T. Cowley *vs.* N. P. R. R. Co. Filed Sept. 6, 1888. D. A. Clement, clerk. Blake & Ridpath, att'ys for pl'tff.

56 In the District Court of the Territory of Washington, Fourth Judicial District, Holding Terms at Spokane Falls.

H. T. COWLEY, Plaintiff, } 2283. Order Quashing Service of
vs. Summons. Leave to Sheriff to
N. P. RAILROAD CO., Defendant. } Amend.

This cause coming on to be heard, on the motion by defendant to quash the service of summons herein, J. M. Kinnaird appearing for the motion and Mr. Blake, of counsel for plaintiff, appearing and confessing said motion—

It is therefore ordered that said service be, and the same is hereby, quashed and held to be of no effect, and, on motion of plaintiff, sheriff is granted leave to amend his return.

Done in chambers this 30th day of July, 1888.

NASH, *Judge.*

57 In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at Spokane Falls, in and for Spokane County.

H. T. COWLEY, Plaintiff, }
vs. } 2283. Journal Entry.
NORTHERN PACIFIC RAILROAD COMPANY, }
Defendant. }

The motion of defendant for confirmation of the report of the referee and the motion of plaintiff to set aside said report coming up for hearing before the judge of the above-entitled court, at chambers, this 23d day of October, 1889, in pursuance of notice

served on attorneys for plaintiff by attorneys for defendant calling said motion up for hearing, and both parties appearing by counsel, the plaintiff, by W. M. Ridpath, and the defendant, by J. H. Mitchell, Jr., the plaintiff, by his attorney, moves for a continuance of said hearing, the motion being based upon an affidavit of W. M. Ridpath produced in support thereof, and it appearing from said affidavit that the findings of fact and conclusions of law of the referee were destroyed by fire, and it also appearing that a properly certified copy could be substituted therefor—

58 It is ordered by the judge that the hearing of said motions be, and hereby is, continued until Thursday, the 31st day of October, 1889, at the hour of 10 o'clock a. m. or such time as counsel can be heard.

And leave is hereby given to substitute a properly certified copy of said findings of fact and conclusions of law, and that said substitution be made in accordance with the order or rule of the court heretofore made and now in force with regard to the substitution of papers destroyed by fire.

Dated October 23, 1889.

W. H. CALKINS, *Judge.*

59 In the District Court of Washington Territory for the Fourth Judicial District Thereof, Holding Terms at Spokane Falls.

H. T. COWLEY, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Now comes the defendant in the above-entitled action and moves the court for an order confirming the report of the referee in the above-entitled action as to all conclusions of law therein and confirming said report as to all findings of fact save and excepting the sixth (6th), ninth (9th), thirteenth (13th), fourteenth (14th), and eighteenth (18th), findings, and as to said findings, to wit, the findings of fact hereinbefore enumerated, defendant excepts to same and moves to set them aside, for the reasons that they are not sustained by the evidence and are contrary to law.

MITCHELL, ASHTON & CHAPMAN,
Att'ys for Defendant.

Dated Aug. 8th, '89.

[Endorsed:] In district court at Spokane. 2283. H. T. Cowley, pl'tff, *vs.* N. P. R. R. Co., d'f't. Motion. Rec'd copy hereof this 8th August, '89. Blake & Ridpath, att'ys for pl'tff. Filed Aug. 8, 1889. Harry A. Clarke, clerk, by Dan. D. Calkins, deputy. Mitchell, Ashton & Chapman, att'ys for d'f'd't.

60 In the District Court of Washington Territory for the Fourth Judicial District Thereof, Holding Terms at Spokane Falls.

H. T. COWLEY, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The plaintiff moves the court to set aside the report of the referee herein, both with respect to his findings of fact and conclusions of law, for the following reasons, to wit:

1. Because the findings of facts are not sustained by sufficient evidence and are against the law.
2. Because finding of fact numbered seven (7) is not sustained by the evidence and is contrary to law.
3. Because finding of fact numbered eight (8) is not sustained by the evidence and is contrary to law.
4. Because finding of fact numbered eleven (11) is not sustained by the evidence and is contrary to law.
5. Because finding of fact numbered nineteen (19) is not sustained by the evidence and is contrary to law.
6. Because finding of fact numbered twenty (20) is not sustained by the evidence and is contrary to law.
7. Because finding of fact numbered twenty-one (21) is not sustained by the evidence and is contrary to law.

61 8. Because the conclusions of law are erroneous and are not supported by the facts found.

9. Because the first conclusion of law is erroneous and is not supported by the facts found.
10. Because the second conclusion of law is erroneous and is not supported by the facts found.
11. Because the third conclusion of law is erroneous and is not supported by the facts found.

BLAKE & RIDPATH,
Attorneys for Plaintiff.

[Endorsed:] 2283. H. T. Cowley *vs.* N. P. R. R. Co. Motion to set aside report of referee. Filed Aug. 6th, 1889. Harry A. Clarke, clerk, by A. S. Johnston, deputy.

62 In the District Court for the Fourth Judicial District, Washington Territory, Holding Terms at Spokane Falls.

H. T. COWLEY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Thirty Days' Time Granted to Take Such Action as Either May Deem Best.

Ordered by the court that both plaintiff and defendant in the above-mentioned case be granted thirty days to take such action on the referee's report filed herein as either may deem best.

Dated July 9, 1889.

W. H. CALKINS, *Judge.*

63 H. T. COWLEY
vs.
THE NORTHERN PACIFIC RAILWAY COMPANY.

This case was tried before a referee, who has reported to the court the testimony taken, with his findings of fact and conclusion of law.

The plaintiff has moved against the report to set aside the findings of fact as a whole, and also to set aside the conclusions of law.

The objections to the findings of fact in their entirety will be denied for the reason that a general objection is not good. It is necessary for a party complaining of error to specify the error.

The plaintiff also moves to set aside the findings contained in the 7th, 8th, 11th, 19th, 20th, and 21st paragraphs of the findings of fact as not being supported by sufficient evidence and as embodying legal conclusions rather than conclusions of fact. I deny the motion as to the 7th, 8th, 11th, and 20th, and sustain it as to the 19th and 21st. The 19th is a finding with relation to a power of attorney executed by the plaintiffs to Mr. Albert Hagan. I think the whole of the controversy relating to the power of attorney is irrelevant in this case. The power of attorney was not pleaded in the defendant's answer as a matter on which the defendant relied, and the testimony in the case shows that in all the proceedings
64 and transactions between the parties affecting the material issues in the case this power of attorney was ignored—was not acted upon. There was no attempt to compromise the controversy between the parties through the medium of the attorney-in-fact by virtue of that power, and I think that the claim now asserted by the defendant in relation to the power of attorney is an afterthought.

The 21st paragraph so far as it is a conclusion of fact is unnecessary, and so far as it is a conclusion of law it is improper, if not erroneous; so that it will be stricken out.

The defendant has also filed exceptions to certain findings of fact that are specified, which exceptions are all overruled by the court, and the court now adopts the findings reported by the referee, excepting the 19th and 21st paragraphs, as the basis of the decision of the court. They are as follows:

"First. That the Northern Pacific Railroad (the defendant in this case) on the 29th day of June, 1886, commenced an action in the district court, fourth judicial district, Washington Territory, sitting in and for Spokane county, against H. T. Cowley, plaintiff in this case, to recover possession of certain lands in complaint in that case described.

"Second. That said H. T. Cowley (plaintiff in this case),
65 for answer to complaint in the above-described suit, filed his answer, claiming equitable relief thereby, to wit, specific performance of contract of land described in complaint.

"Third. That on or about the — day of April, 1887, the firm of Ganahl & Hagan, a law firm composed of Frank Ganahl and A. Hagan, were employed by Cowley to represent him in his defense in the case of N. P. R. R. Co. *vs.* Cowley, under contract whereby

they were to receive one-fourth of all money or land recovered by Cowley.

"Fourth. That at the November, 1887, term of the district court Emma Thomson was appointed referee to take evidence in the case, and as such referee caused the parties to appear before her, at her office in the city of Spokane Falls, on the 10th day of May, 1888, to take said testimony. The N. P. R. R. Co. appeared by its attorney, J. H. Mitchell, Jr., and the defendant, Cowley, by Ganahl & Hagan, his attorneys. Upon agreement of parties taking of testimony was postponed until May 11th, the same being the next day.

"Fifth. That upon the said 10th day of May, 1888, Paul Schulze, general land agent of the N. P. R. R. Co. and its duly authorized agent, upon behalf of the company made a proposition of settlement to Ganahl & Hagan, attorneys for Cowley, of the differences concerning land in dispute in case of R. R. Co. *vs.* Cowley,
66 the proposition being this: The railroad company would give Cowley $8,000 cash and convey to him a tract of land upon which Cowley's improvements were, and comprising about seven and one-half acres, the company to retain the balance of the land.

"Sixth. That Ganahl & Hagan thereupon informed Cowley of the proposition and what it was and advised him to accept it, as there was an estoppel in his case that would prevent him from recovering the land in their judgment.

"Seventh. That upon the evening of said 10th day of May, 1888, said Schulze, Hagan, and Mitchell went to the residence of Cowley, in the city of Spokane Falls, and there met Cowley and Mrs. Cowley, his wife. The proposition above referred to was discussed by them and an oral agreement of settlement settling their differences was entered into, which agreement was in substance as follows, to wit: The R. R. Co. was to give Cowley $8,000 and a tract of land upon which Cowley's improvements were, embracing about seven and one-half acres; the R. R. Co. was to retain the balance of the land. Schulze further agreed to give Mrs. Cowley, or any person she might designate, two lots of land for church purposes; these two lots were to be given by Schulze personally; the R. R. Co. was to pay all costs that had been incurred in the case;
67 the respective attorneys in the case were to prepare all necessary papers for settlement, but nothing was said as to the kind and character of papers necessary; the $8,000 and papers were to be sent to J. N. Glover, president of the First National bank, Spokane Falls, W. T., who should deliver to Cowley or his attorneys, and it was calculated that the money and these papers would arrive about the 16th day of May following. Nothing was said as to the manner in which the case of the R. R. Co. *vs.* Cowley should be disposed, further than that a disposition of same should be made by attorneys.

"Eighth. That on Monday, the 14th day of May, 1888, Schulze secured a draft for $8,000, payable to the order of J. N. Glover; also had prepared a certificate of sale from N. P. R. R. Co. to Cowley, duly executed by the company, conveying to Cowley the seven and one-half

acres mentioned in agreement of settlement; also a plat of said land and also a quitclaim deed from Cowley and wife to the R. R. Co. for all land claimed by the company in complaint case R. R. Co. *vs.* Cowley; placed these all in an envelope and sent the same to J. N. Glover. In said envelope was also a letter of instructions to Glover directing him to see Cowley and his attorneys, and upon Cowley signing and executing the quitclaim deed he should
68 turn over and deliver to them the money, certificate of sale, and plat. All of these documents and money *was* received by said Glover on the 16th day of May.

"Ninth. On the 15th day of May, 1888, Cowley went to the office of one of his attorneys, to wit, Hagan, and informed him that he was dissatisfied with the settlement, and that he desired to employ associate counsel to assist them (Ganahl & Hagan), to which Hagan objected, except they (Ganahl & Hagan) should be paid the amount due them for their fees; whereupon negotiations for settlement of fees *was* entered into between them.

"Tenth. That on the fifteenth day of May Cowley also sent telegram to Schulze to the effect that he must have additional time to consider proposition of settlement, which was received by Schulze upon same date and was answered by him to the effect that there was nothing to consider, settlement had been made, papers and money had been sent.

"Eleventh. That upon receipt of money and papers on the 16th day of May, Glover at once took all papers to the office of Ganahl & Hagan, where he found both members of the firm: also Cowley. Glover informed them that he had received all the papers and money. He gave one of the attorneys the papers and also
69 exhibited to them his letter of instructions. He informed them that the money would be paid as soon as Cowley and wife would execute and deliver the quitclaim deed. He was informed that the matter would be attended to that day and he would be called upon to pay the money. After Glover left and upon same day Cowley and wife refused to execute the quitclaim deed and have so refused ever since said time. The money is now and has ever since said time been in Glover's hands and ready to be turned over to Cowley upon delivery of quitclaim deed duly executed.

"Twelfth. That on the 17th day of May Cowley wrote and sent Mitchell and Schulze each a letter to the effect that the proposition of compromise had not been accepted; that Ganahl & Hagan had been discharged as his attorneys and were not authorized to represent him, and all further communications should be made through his attorneys, Blake & Ridpath, which letters were received by them about the 19th day of May, and upon that day they each wrote Cowley to the effect that they would recognize no other attorneys in the case without the charges of former counsel were paid and the names of other attorneys substituted by order of the court.

"Thirteenth. That on the said 17th day of May Cowley wrote a letter to Ganahl & Hagan, and had the same delivered to
70 them, to the effect that he discharged them as his attorneys and had employed other counsel to represent him. Upon

said date Ganahl & Hagan wrote and had delivered to Cowley a letter to the effect that they demanded $4,000 for their fee, and would consider no less sum, and also that they had on motion set case down for taking testimony, to commence on Monday, May 21st.

"Fourteenth. That upon the 18th day of May the referee, Emma Thomson, issued a citation to Mitchell, as attorney for the R. R. Co., and Ganahl & Hagan, as attorneys for Cowley, to the effect that on the 21st day of May she would proceed to take testimony in the case of the R. R. Co. *vs.* Cowley, one of which notices is filed herewith and made part hereof and marked Exhibit —. Thereupon, upon the same day, to wit, May 18th, 1888, said Cowley telegraphed said Mitchell, as such attorney, that he could not take testimony on Monday, as he had changed attorneys. On the same day, in answer thereto, said Mitchell telegraphed said Cowley that he had never arranged for taking testimony on Monday or any time subsequent to May 10th, when, as he said, counsel gave them to understand no taking of testimony would be necessary, and saying that Mr. Schulze, his principal witness, relying on Cowley's word,

71 since broken, had made engagements making it impossible for him to go to Spokane Falls in said case for several weeks, and that the case would not go on until Schulze could go, and he (Cowley) could depend on that, and he added: "If you must have a fight you shall have it." Said telegram is filed herewith and made a part hereof and marked Exhibit —.

Fifteenth. That the 21st day of May, 1888, was the first day of the May, 1888, term of the district court, upon which date a stipulation was entered into by Mitchell, as attorney for the N. P. R. R. Co., and Ganahl & Hagan, as attorneys for Cowley, to the effect that the case of the N. P. R. R. Co. *vs.* Cowley had been settled and compromised, and upon payment to defendant, H. T. Cowley, or his attorneys for said Cowley, of the sum of $8,000 and the delivery to him or his attorneys — a certificate or contract of deed duly executed for seven and one-half acres of land at or near defendant Cowley's house, as agreed upon, judgment for plaintiff then to be entered for the restitution of the premises mentioned in plaintiff's complaint, as therein prayed for, and denying the relief prayed for in defendant's answer on cross-bill at plaintiff's costs; which stipulation was filed in court with the papers in the case of R. R. Co. *vs.* Cowley.

Sixteenth. That Ganahl & Hagan executed and signed a receipt as follows, to wit:

72 "We hereby acknowledge receipt from the Northern Pacific Railroad Company a certificate of sale in nature of contract to convey to the said H. T. Cowley the land described in the stipulation heretofore made herein as being about seven and one-half acres of land at or near defendant's house, and of the receipt this day from said company of the sum of eight thousand dollars, placed at the First National Bank of Spokane Falls subject to our order for said Cowley, as agreed upon, and hereby acknowledge the

terms of said stipulation and the settlement therein mentioned to have been fully complied with and full satisfaction made thereof.

Dated May 16, 1888.

GANAHL & HAGAN,
Attorneys for Defendant, H. T. Cowley.

Ganahl & Hagan have never received the $8,000. That money is the same heretofore mentioned as being in the possession of J. N. Glover and subject to the order of Ganahl & Hagan and Cowley under certain restrictions mentioned.

Seventeenth. That upon the said 21st day of May, 1888, upon filing stipulation and receipt above described, judgment was rendered for plaintiff R. R. Co. and against Cowley for possession of all the land except the seven and one-half acres previously de-
73 scribed herein, and the relief prayed for by Cowley was denied.

Eighteenth. That Cowley did not know that the above-described stipulation had been entered into by the attorneys, nor that the receipt set forth had been given, nor that the judgment had been rendered and entered until all had been done, and upon hearing of same he at once entered his objection to such stipulation, judgment, &c., and protested against it, and has so protested ever since said time. This action was instituted to set aside that judgment and decree.

Twentieth. That upon the 21st day of May, 1888, Ganahl & Hagan were the duly authorized and acting attorneys for Cowley in case N. P. R. R. Co. *vs.* Cowley, and had full power to act as such.

Upon this state of facts it becomes a question as to what the rights of the parties are as regards the case which, as claimed by the defendant, was compromised and finally adjudicated in the district court. The plaintiff is in a court of equity seeking purely equitable relief. He does not stand in a very good light in equity. It appears that he is not only seeking to annul the action of the court by which he claims important rights of his have been unjustly cut off, but the object of this suit is to reach beyond
74 and cancel an agreement which he voluntarily made to compromise that case. Admitting that he was acting under the advice of his counsel and that the advice given upon the questions of law involved was predicated upon an erroneous and unsound opinion, still, as I view the matter, considering the delays and uncertainty of litigation, no good lawyer would probably do less than Mr. Hagan did in advising Mr. Cowley as to the propriety and wisdom of accepting the proposition then made, and I cannot find that there was any bad faith on the part of the plaintiff's attorneys that would justify him in attempting to recede from his agreement made after deliberation and with a full understanding of the facts.

However, there was only an understanding between the parties as to the terms upon which the contract would be concluded, and there was not a contract actually made and concluded.

Now, that agreement, even if it were binding in law and equity upon Mr. Cowley has never been executed, never has been carried

into effect. It has never been performed on the defendant's part so as to entitle it to any judgment in the district court in the original case, and it is not by virtue of any executed agreement between the parties that the railroad company can claim that the judg-
75 ment was properly entered. The stipulation that was signed by Ganahl & Hagan, as attorneys for Mr. Cowley, was not only unauthorized, but it was made in defiance of his known wishes in the matter. The judgment rendered on that stipulation was therefore improperly rendered and it was unjust. I have no hesitation in saying that if the judgment were moved against in any proper way it should, as a matter of right, be vacated.

But is the plaintiff entitled to such relief in this separate suit in equity? This I find to be the serious and difficult question in the case.

It is not according to equity practice to decree that a judgment be vacated or annulled, or to act directly upon the case in which an unjust or void judgment has been rendered. The power of the court is exerted by dealing with the parties who have obtained an unfair advantage through an unconscionable judgment by restraining them from enforcing it.

The law on this subject is stated in section 367, of Black on Judgments, volume 1. "The action of a court of equity in giving relief against a judgment at law is almost always indirect. Courts of chancery, it must be remembered, do not claim to exer-
76 cise any supervisory power over the courts at law or their proceedings. Judgments are not reversed or vacated in equity. Adjudications at law are not overhauled or re-examined. It is to the party himself that the energies of the court of equity are directed, and its remedial power is exercised by putting restraint upon his usual liberty of following up his judgment by the appropriate process for its collection. Equity acts, therefore, on the person, not the proceeding, and while it will enjoin the enforcement of a judgment in proper cases, it will not interfere with the judgment itself."

Then, too, there is this fundamental principle of chancery practice. That relief is granted only when necessary to protect a right or prevent the doing of irreparable mischief, and necessity for such relief cannot be claimed unless the party asking for it is without a remedy at law. The court will be careful not to encroach upon another jurisdiction, and it will not in any case revise or attempt to correct errors in proceedings of other courts.

In harmony with these principles the court must decline to interfere by annulling or enjoining the execution of *of* an unjust judgment, if the same result can as well be obtained by a motion or petition in the original case, and only when the court which
77 rendered the unjust judgment is closed to an application, or powerless to grant relief, can a court of equity in a distinct suit exert its extraordinary power.

In this State the statutes contain provisions affording specific and ample relief to all persons having cause of complaint similar to that of this plaintiff.

He could under the statute, upon the showing which he has made in this suit, have successfully urged a motion to vacate the judgment complained of. The time allowed by this statute for making such motion did not expire until after this suit was commenced. The remedy at law was adequate. This suit was unnecessary and therefore the court will refuse to aid the plaintiff. This rule is better stated in section 362 of Black on Judgments, volume I: "The liberal practice of the courts in granting new trials and entertaining motions to vacate or open their own judgments and the enactment of statute in many of the States authorizing the setting aside of judgments taken against a defendant 'through his mistake, inadvertence, surprise, or excusable neglect' have considerably abridged the province of equity in giving relief by injunction, and the rule is generally adhered to, as the more safe and conservative
principle, that equity will not grant relief against an execu-
78 tion if the party can equally well be relieved, on motion, in the court which issued the execution or has control of it. It is true that some cases maintain a different view, holding that although the judgment might be vacated or set aside, on motion, and although the time for so moving has not yet expired, still equity may enjoin the enforcement of the judgment; but in so holding they depart from the fundamental principles of equity and are not to be commended."

I have examined the following authorities cited by this author and find that they support the doctrine of the text:

Imlay *vs.* Carpentier, 14 Cal., 173.
Bibend *vs.* Krentz, 20 Cal., 109.
Logan *vs.* Hillegrass, 16 Cal., 201.
Hintrager *vs.* Sumbarger, 54 Iowa, 604 (S. C., 7 Northwestern Reporter, 92).
Simpson *vs.* Hart, 14 Johnson, 63.

In the case reported in 20th Cal. the court in its opinion states the reason for the interference of equity in cases similar to this one in a quotation from Storey's Equity Jurisprudence as follows: "It may be stated that in all cases where by accident or mistake or fraud or otherwise a party has an unfair advantage in proceedings
in a court of law which must necessarily make that court an
79 instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from using the advantage which he has thus improperly gained." And in the same connection the opinion states the general rule as follows: "The assistance of equity cannot be invoked so long as the remedy by motion exists."

But one other argument remains to be considered. This suit was commenced in the court that rendered the judgment sought to be vacated; the bill denominated a complaint under the practice in the territorial court contains all the matter required by the statute to be set forth in a motion or petition to vacate a judgment, and it is urged that this independent suit may therefore be regarded as in

effect the same thing as a proceeding under the statute to vacate a judgment by an order of the court which rendered it.

I consider, however, that this suit is not the same as a proceeding under the code. The rights of the parties and the limitations of their rights in such a statutory proceeding are quite different from the rights and limitations and the rules which must govern the decision of a suit in equity, and the effect of a decision or judgment are entirely different. It would be contrary to the principles of equity after a cause has been conducted as this case has through all the stages of a regular suit to a final hearing to now transform it into a summary proceeding under the statute.

The plaintiff has, in my opinion, mistaken his remedy, and for that reason his suit must be dismissed.

C. H. HANFORD, *Judge*.

[Endorsed:] No. —. In the circuit court of the United States, ninth judicial district, district of Washington. H. T. Cowley *vs.* N. P. R. R. Co. Opinion. Filed April 16th, 1891. A. Reeves Ayres, clerk, by S. A. Wells, deputy.

On Motion for Rehearing.

After carefully considering the arguments and authorities cited on the motion for a rehearing of this cause, I still feel constrained to adhere to the decision already given, and to rest the decision of the case on the grounds stated in the opinion on file.

There is something more than a difference of mere form between a suit in equity by an original bill to vacate a judgment or decree and a proceeding under the code, a difference which is made plain by the following extracts from the opinion of the Supreme Court of the United States in the case of Barrow *vs.* Hunton, 99 U. S., pages 82 and 83:

"The question presented with regard to the jurisdiction of the circuit court is whether the proceeding to procure a nullity of a former judgment in such a case as the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding so connected with the original suit as to form an incident to it and substantially a continuation of it."

* * * * * * *

"The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities or of the legality and the correctness of the judgments and decrees of the State courts, and in the other class the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree or of the parties' right to claim any benefit by reason thereof.

This court has not acquired jurisdiction of the original case. To effect a transfer thereof from the territorial district court and in-

vest this court with jurisdiction, it is essential that a request in writing by one of the parties be filed in the "proper court."

25 U. S. Statutes, 683, section 23.

This has not been done, and no part of the record of that case has come into the custody of this court. The parties have not even seen fit to offer either the original record or a copy as evidence on the trial. Therefore, if we are dealing with a statutory proceeding supplementary to the judgment assailed and not with a new and distinct suit, the court can do nothing else than dismiss it for want of jurisdiction.

As to the question whether the right to sue in equity remains, notwithstanding the statutory provisions for proceeding in the original case to obtain the vacation of a decree or judgment improvidently rendered or obtained by fraud, there is said to be a conflict of authorities, and a number of cases have been cited,
84 including the decisions of the Supreme Court, containing dicta to this effect. I think, however, that the rules given in the authorities which I have heretofore cited are founded in reason and the elementary principles of equity jurisprudence, and the court is not required to disregard them by reason of any authorities to which my attention has been directed.

In the argument for a rehearing it has been urged, however, that by the removal of the cause into a United States court in which the modern practice of mingling law and equity in one form of proceeding is not permissible the parties have acquired new rights and are entitled in this court to have a decision according to equity unaffected by local legislation, and the plaintiff claims that he is entitled to the same relief, and that the court should proceed in this cause in the same manner as if it had been originally commenced in this court and had proceeded therein from its inception according to the true equity practice, and it is urged that the court cannot now say to this plaintiff that, because he could have obtained relief in a different form of proceeding and in another form, this court will not entertain his cause or grant him the relief to which he is
in equity entitled, for to thus hold would be equivalent to
85 saying that a statute of the State has intervened as a bar to obtaining equitable relief in this court, and to that extent has abridged the equity power and jurisdiction of a national court. I think, however, that the rights of the parties involved in this case were fixed by existing laws prior to the time of the creation of this court, and that the case should be decided so as to give each party all, but no greater rights than he could obtain under the laws existing at the time the suit was commenced.

C. H. HANFORD, *Judge*.

May 19, 1891.

86 Ex. "A."

MAY 15, '88.

To Paul Schulze, Tacoma, W. T.:

We must have additional time to consider your proposition of compromise. H. T. COWLEY.

EX. "B."

TACOMA, W. T., 5, 15, '88.

To Rev. H. T. Cowley:

Telegram received. Nothing to consider. Compromise made and all papers and money sent. Consider matter settled.

PAUL SCHULZE.

EX. "C."

MAY 18, '88.

To Jno. Mitchell, Jr., attorney N. P. R. R. Co., Tacoma, W. T.:

Cannot take testimony Monday. Have changed attorneys.

H. T. COWLEY.

EX. "D."

TACOMA, W. T., 5, 18, '88.

To H. T. Cowley:

Never arranged for taking testimony on Monday or any time subsequent to May 10, when I was ready with my witnesses
87 and when you by positive agreement of settlement gave us to understand that no taking of testimony would be necessary. Mr. Schulze, my principal witness, depending on your word, since broken, has made engagements making it impossible for him to go to Spokane Falls in this case for several weeks. The case will not go on until he can go; this you can depend on. If you must have a fight you shall have it.

J. H. MITCHELL, JR.

EX. "E."

SPOKANE FALLS, W. T., *May* 17, '88.

Jno. Mitchell, Esq., attorney N. P. R. R. Co., Tacoma, W. T.

DEAR SIR: I herewith notify you that your recent proposition of compromise in the case of the N. P. R. R. Co. against myself has not been accepted; that Messrs. Ganahl & Hagan, having been discharged by me from any further connection with the case, are not authorized to represent me, and that any further communications you may desire in this matter will be through my duly employed attorneys, Messrs. Blake & Ridpath, this city.

Yours respectfully, H. T. COWLEY.

88 EX. "F."

TACOMA, WASH. TERR., *May 19th*, 1888.

H. T. Cowley, Esq., Spokane Falls, W. T.

DEAR SIR: Your favor of the 17th inst., in which you undertake to notify me that you have discharged Messrs. Ganahl & Hagan as attorneys in the case of The Northern Pacific Railroad Company against yourself, has been received.

On behalf of the company I wish to say that you are hereby given to understand that no attorneys in your behalf other than Messrs. Ganahl & Hagan, the attorneys now of record in the case, will be recognized until by order of the court they are discharged as attorneys in the case, their charges against you paid, and other attorneys substituted by the direction of the court.

PAUL SCHULZE,
Gen. Land Agent.

89 EX. "G."

TACOMA, WASH. TERR., *May 19th*, 1888.

H. T. Cowley, Esq., Spokane Falls, W. T.

DEAR SIR: Your favor of the 17th inst., in which you undertake to notify me that you have discharged Messrs. Ganahl & Hagan as attorneys in the case of The Northern Pacific Railroad Co. against yourself, has been received.

On behalf of the company I wish to say that your are hereby given to understand that no attorneys in your behalf other than Messrs. Ganahl & Hagan, the attorneys now of record in the case, will be recognized until by order of the court they are discharged as attorneys in the case, their charges against you paid, and other attorneys substituted by direction of the court.

Yours respectfully, J. H. MITCHELL, JR.,
Ass't Counsel N. P. R. R. Co.

[Endorsed:] Cowley *vs.* N. P. R. R. Co. Exhibits

90 Know all men by these presents that we, H. T. Cowley and Lucy A. Cowley, his wife, both of the city of Spokane Falls, Washington Territory, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Albert Hagan, of the same place, our true and lawful attorney for us and in our names, places, and stead to settle and adjust a certain lawsuit now pending in the district court of the fourth judicial district of the Territory of Washington in and for the county of Spokane, wherein The Northern Pacific Railroad Company is plaintiff and H. T. Cowley is defendant, and involving a contract of purchase between the said parties to the east half of northeast quarter and the northeast quarter of the southeast quarter of section nineteen, township twenty-five north, range forty-three east, W. M., upon such terms and conditions as to our said attorney shall seem just and equitable, and for the purpose of effecting such settlement we hereby authorize and empower him for us and in our names to execute and deliver all necessary instruments under seal or otherwise, giving and granting to our said attorney full power in the premises.

In witness whereof we have hereunto set our hands and seals this 28th day of February, 1888.

H. T. COWLEY. [SEAL.]
LUCY A. COWLEY. [SEAL.]

Signed, sealed, and delivered in the presence of—
PAUL J. STROBACH.
B. A. ERWIN.

91 TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

I, Paul J. Strobach, a notary public in and for said county and Territory, do hereby certify that on this 2nd day of March, 1888, personally appeared before me H. T. Cowley and Lucy A. Cowley, his wife, to me known to be the individuals described in and who executed the within instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

And this further certifies that Lucy A. Cowley, wife of the said H. T. Cowley, on an examination made by me separate and apart from her said husband, after I had fully apprised her of the contents of said power of attorney and effects of signing the same and her rights, she did freely and voluntarily, separate and apart from her said husband, sign and acknowledge the said instrument as her free and voluntary act and deed.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

PAUL J. STROBACH, [SEAL.]
Notary Public.

[Endorsed:] H. T. Cowley & Lucy A. Cowley to Albert Hagan. Copy. Power of attorney. Substituted for original Exhibit H.

92 H. T. COWLEY, plaintiff, called in his own behalf, being first duly sworn, testified as follows:

Direct examination by Mr. BLAKE:

Q. State your name, age, and place of residence.

A. My name is Henry T. Cowley; age, fifty years; residence, Spokane Falls, Washington Territory.

Q. Are you the plaintiff in this case?

A. I am.

Q. How long have you lived in Spokane Falls?

A. Fifteen years.

Q. Are you the man of a family?

A. I am.

Q. Where do you live with reference to the land in controversy?

A. I live on the boundary between sections 19 and 20, on the southeast forty-acre tract. There are three forty-acre tracts.

Q. How long have you lived there?

A. Fifteen years nearly; will be next October.

Q. Who were your attorneys in the case of the railroad company against yourself last May?

A. Messrs. Ganahl and Hagan.

Q. Was there a day fixed for the taking of the testimony before a referee about that time?

A. Yes, sir.

Q. What day was that?

93 A. Fixed for the 10th day of May.

Q. Who was the referee?

A. Miss Emma Thomson.

Q. Had you had frequent consultations with Ganahl and Hagan with reference to your case up to that time?

A. I had.

Q. Had all the facts of your case been fully laid before them?

A. Yes, sir.

Q. What, if anything, had been their advice to you up to that time concerning the merits of your case?

A. They had always assured me that I had an absolute sure case in court.

Q. State whether they had up to that time advised you that there was any legal proposition or proposition of fact in the way of your recovery.

A. They had not until that day.

Q. What did they tell you on that day as to the lik-lihood of your recovery? Go ahead and tell how it came up.

A. I had an appointment with Mr. Ganahl at eight o'clock on the morning of that day to review the testimony and get all the points clearly. We spent something like an hour in the forenoon going over the ground and with some interruptions; we went to lunch and returned from lunch about half past twelve, and on repairing to Mr. Ganahl's office I met both Mr. Hagan and Mr. Ganahl coming from the office, in the office hall. Mr. Hagan passed me and Mr. Ganahl stopped me and asked if my wife was able to come to town; stated that the representatives of the Northern Pacific road, Mr. Schultz and Mr. Mitchell, were here and
94 had a compromise to offer, and advised me to take it, and said, "I heard this morning in regard to your case something that made me think you had better take it, and you had better have Mrs. Cowley come down and talk it over, and Mr. Hagan has the proposition and he will lay it before you." I went up and got my wife in a hack and came down, and at one o'clock three witnesses that Mr. Ganahl had required me to summons were there in the office ready to give their testimony, and about fifteen minutes past one——

Q. Who were those witnesses?

Mr. MITCHELL: I object to that.

Mr. BLAKE: I withdraw the question.

Q. Go ahead now and tell what, if anything, was said between you and Hagan and Ganahl or either of them.

Defendant, by counsel, objected to the last question for the reason it was immaterial, irrelevant, and for the further reason that it has not been shown that any one representing the defendant was present at any such conversation; which objection was overruled by the referee; to which ruling of the referee defendant, by counsel, then and there excepted.

A. Mr. Hagan stated the compromise after being seated.

Q. Tell what he said.

A. He stated that Schultz had arrived that day and they had

been in consultation during the forenoon and had stated to him the terms of compromise, which were $8,000 in cash and about thirty lots of land adjoining my residence, on which I had my principal improvements, which were worth about $500 a lot, making the total of the compromise about $23,000 to me, and he stated he considered it a very desirable compromise; that he had considered the case weak for some time; that Judge Ganahl had been holding out and differed with him in his views with regard to a certain point, but that that day Judge Ganahl had finally agreed with him. That forenoon, after the compromise had been offered, I applied with my statement. I think also in addition to that that Mr. Hagan stated that it was desirable to close the thing at once; that we had now about an half an hour before proceeding to take testimony, and Mr. Schultz was expecting to have witnesses, and it was necessary for him to have the settlement at once or proceed with the testimony. I called their attention to the circumstances that they had assured me up to that day that they considered the case almost absolutely sure; that this point they had referred to or the particular point was out of the way, and there was nothing in the way referring to what they called an estoppel. I called their attention to the fact we had talked about the matter of compromise before when they had somewhat argued the matter, and I had given them opportunity to withdraw from the case if they didn't consider it a secure one, and they decided not to withdraw but to carry it forward, and never expressed any lack of confidence up to that day.

95

Q. Was Mr. Ganahl present at that conversation?

A. Yes, sir.

Q. Who else was present?

A. Mr. Havermale, Mr. Newton, Mr. Maxim, and my wife.

Q. Had you seen either Mr. Mitchell or Schultz up to that time?

A. I had not.

Q. What time in the afternoon was that conversation?

A. It was about a quarter past one; probably occupied something like an hour before we were through.

Q. Well, what was done next?

A. Mr. Hagan appealed to my wife, and she stated that she considered the time unreasonably short for the consideration of any compromise; that if we were to entertain such a compromise we ought to have more time, and Judge Ganahl stated that he would have Mr. Schultz informed about it and went out, I think, to confer with him in regard to it, and returned and stated that it was necessary that we should decide then and there or else proceed to the taking of testimony.

96

Q. What was then said or done?

A. Mr. Hagan left the office, which was Ganahl's office, and I had some talk with my wife, and Mr. Ganahl suggested after talking over some of the features of the matter that I should see Mr. Schultz myself; said that he would not see him. I went up to Mr. Hagan's office and asked him what he thought about that, and he said, "You had better go and see Mr. Schultz," and I went in search of Mr.

Schultz and found him in Mr. Newbury's land office, and had an interview with him, and asked him to state his understanding of the proposition, and told him that I had the matter under consideration on the advice of my attorneys and didn't know how I would decided the matter, and wanted him to assure me in regard to one point in the whole controversy that the company had mistaken my motives in regard to the claim, and he said that was not business, and they were not dealing with motives, but with business affairs, and I told him it was very desirable to have the right feelings with regard to the matter, and I didn't like to do anything to abuse them, and I asked Mr. Schultz if he would put the proposition in writing, and he said, "I will have to see my attorney about that," and went to see what he would need to put in writing, and that he knew I would carry out my word. I said that it would be desirable to have it in writing, and I would rather insist upon it, and he put
97 on his hat and went up the steps as far as the sidewalk, and said, "I don't know where I will find Mr. Mitchell, and I don't think I can confer with him about this. You will have to take my word," and then returned to the office.

Q. And where did you go?

A. Back to Hagan's office.

Q. Who was present at this conversation with Mr. Schultz in Newbery's office?

A. Nobody was present. It was in the private office.

Q. State whether in that conversation the proposition of compromise was stated either by you or Mr. Schultz.

A. Mr. Schultz stated the compromise.

Q. What did he state the compromise to be at that time?

A. He said it would be $8,000 in cash and seven and a half acres of land which the company considered worth about $1,000 an acre; we have regarded the compromise as equivalent to $15,000.

Q. Did you see Mr. Mitchell that afternoon?

A. I did not.

Q. Did you see Mr. Schultz any more that afternoon?

A. Not to speak with him. I saw him across the street.

Q. Where did you go from Newbery's office?

A. To Mr. Hagan's office.

Q. Where was your wife at that time?

A. She was stopping with a friend.

Q. Did you see Mr. Schultz or Mitchell or either of them that afternoon after dinner?

A. Yes, sir; I had seen Mr. Hagan after leaving Mr. Newbery's office and returned to Ganahl's office, and asked him how he understood the value of the compromise and how he would arrange
98 that in case we accepted it, and he stated that he considered the value as $23,000, and I said I had seen Mr. Schultz and he understood $15,000, and that was a question of settlement between you and me and it ought to be understood before I come to decide, and he said he considered it well worth $23,000; that we wouldn't hang on that account. If I considered it the same as Mr.

Schultz he would take that understanding. I told him before that we would decide the matter that afternoon and let them know.

Q. Well, did you meet him that evening?

A. We did.

Q. Where?

A. At the Windsor house, in the other end of town, and the first time he wasn't in and I called again, and during the evening I talked the matter over with my wife. When Mr. Hagan came I waited for him some time after my second call and he came and I told him I wished to talk the matter over with him again, and I wanted him to understand if he would take the responsibility as a lawyer to assure me that there was a point in the case militant against the decision in our favor that he must assure me that on his honor as a gentleman and skill as a lawyer and I would lay the whole responsibility on him; if he undertook to advise me in that direction he must assume the responsibility. He said he would accept the responsibility, and then cited a case of somewhat similarity in Chicago, a case of estoppel, and said there was no question in regard to the point at all, and we were absolutely without any show in court.

Q. You may state what, if anything, was said between you and him about any further conversation with Mr. Schultz or Mr. Schultz and Mr. Mitchell. Come right on to that.

99 A. Well, with reference to the time, about that——

Q. I want to know if there was anything said in that conversation about seeing Mr. Schultz or Mr. Mitchell, or either of them.

A. No, sir.

Q. Did you have any further conversation with Mr. Schultz and Mitchell that evening?

A. Yes, sir.

Q. How did that come up?

A. I stated that even if we did accept the proposition my wife wished to ask for a piece of land for a parsonage for the church.

Q. Who did you state that to?

A. Mr. Hagan, and he said certainly that should be done; that it was a reasonable request and would have Schultz comply with it.

Q. Go ahead and tell what else was said.

A. He said, "I will proceed at once to find Mr. Schultz and go up to your house and assure your wife about that and we can have the thing all arranged this evening," and it was, and returned with the hack and Mr. Schultz and Mitchell and invited me to ride with them to my residence and arrived there.

Q. You say he went out to find Mr. Schultz and Mitchell and then came to the Windsor in a hack and all went to your house?

A. Yes, sir.

Q. Who did you find at your house when you got there?

A. My wife and three of our children were still up; it was then between nine and ten o'clock.

Q. At night?

A. Yes, sir; waiting for me, and Mr. Schultz after being
100 seated proceeded to state the terms of the compromise.

Q. Tell what he said as near as you can in his language.

A. I can't relate his exact language—the substance of it—he proceeded to state to my wife and made that reference to the lot desired for a parsonage and she could have that wherever we wanted, and they were placed on the east side of the property, on the other side of the track, and he would make arrangements to have two lots, and said he would pay for one himself, and, after having gone through with the proposition and urging us to accept it as the best way to settle the matter, he said, "Now, I think we understand each other;" that there was some talk in regard to the final items and settlement.

Q. What did he say there, if anything, as to the terms of the compromise?

A. He stated to my wife that the compromise would be $8,000 in cash and seven and a half acres of land, which he considered worth $15,000.

Q. Tell anything else that was said there by him or you.

A. He asked before his departure whom he should send the papers to, to what name he should direct it. My wife anticipated for reasons of her own and suggested Mr. Cowley, and in regard to—there was some mention made in regard to the expenses of the suit accrued up to that time, and I asked Mr. Schultz if the company felt like defraying those expenses, and he said they would. I believe that was about all. Mitchell and myself said something in regard to street crossing and had some little conversation in regard to one or two points with Mr. Mitchell, nothing essential to the case.

Q. What, if anything, was said by anybody as to whether all of you understood the matter or not fully?

101 A. I think they nodded assent.

Q. What was said by any one about whether the matter was thoroughly understood or not?

A. Mr. Schultz said, "I think we thoroughly understand each other."

Q. And you think—you say you think you nodded assent?

A. Yes, sir.

Q. What, if anything, was said concerning the manner or method of closing up the proposed compromise further than what you have already related?

A. The closing up of the matter we expected Mr. Hagan to attend to, and made some remark to that effect; when the consideration would arrive he would make out all the necessary papers.

Q. What was said, if anything, about Mr. Hagan or Ganahl or either of them entering into a written stipulation or agreement and filing the same in court?

A. Nothing was said to that effect or hinted at to that effect.

Q. By any of you?

A. No, sir.

Q. Who of your family were present at that conversation?

A. My daughter- Grace, Agnes, and Cassie.

Q. Your wife present?

A. Yes, sir.

Q. Have you told all that you now remember of that conversation at your house?

A. Yes, sir.

Q. What time did they take their leave?

A. I think it must have been pretty near ten o'clock. I
102 am not certain, but it was quite late.

Q. Was there anything said by Mr. Mitchell or Mr. Schultz about their leaving the city?

A. I think Mr. Schultz said he would have to get off on the night train.

Q. I believe you say this was the 10th day of May?

A. Yes, sir.

Q. I will ask you if you sent a telegram to Mr. Schultz on the 15th day of May following.

A. I did.

Q. Touching this proposed compromise?

A. Yes; I telegraphed it myself.

Q. You may look at that telegram and state whether that is the telegram you sent to Mr. Schultz at Tacoma on the 15th day of May last.

A. Yes, sir; it is.

Plaintiff, by counsel, offered and introduced in evidence the telegram just referred to, which was received without objection and marked Exhibit "A" by the stenographer for identification, and is hereto attached and made a part of this record.

Q. You sent that telegram from this city?

A. Yes, sir.

Q. Did you receive a reply from Mr. Schultz to that telegram?

A. I did.

Q. On the same day?

A. Same day.

Q. You may look at that telegram; tell the court whether that is the reply.

103 A. That is the answer I received.

Plaintiff, by counsel, offered and introduced in evidence the telegram just referred to, which was received without objection and marked Exhibit "B" by the stenographer for identification, and is hereto attached and made a part of this record.

Q. You may state whether you received a notice from the referee that the case would be—that the taking of the testimony in the case would continue at any time.

A. I did. I think on the 18th day of May I received notice from the referee requesting me and Mr. Mitchell and Mr. Schultz to take the testimony on the 18th day of May at two o'clock, I think.

Q. At her office?

A. Yes, sir.

Q. When you received that notice, I will ask you if you sent a telegram to Mr. Mitchell—John H. Mitchell—the attorney for the railroad.

A. I did.

Plaintiff, by counsel, here offered in evidence the telegram just referred to, which was objected to by the defendant for the reason it was incompetent and irrelevant.

By Mr. MITCHELL:

Q. When did you get this?
A. I think that was telegraphed on the 18th.
Q. When did you get this paper?
A. I got it on the following Monday.
Q. Whose handwriting is it in?
A. Mine.
Q. When did you write it?
A. I wrote it at the time.
104 Q. Did you write it on this paper?
A. Yes.
Q. When?
A. On Monday following, I think.
Q. Where were you when you wrote it?
A. At the Western Union telegraph office.

Here plaintiff, by counsel, renewed his offer of the telegram, which was objected to by defendant for the reason it was incompetent, immaterial, and irrelevant; which objection was overruled by the referee, and the paper was marked Exhibit "C" by the stenographer for identification, and is hereto attached and made a part of this record.

By Mr. BLAKE:

Q. Did you receive a reply from Mr. Mitchell by telegraph from that telegram?
A. I did.
Q. Of what date?
A. The same date.

Plaintiff, by counsel, offered in evidence the telegram just referred to, which was objected to by defendant for the reason it was immaterial and irrelevant; which objection was overruled by the referee, and telegram was marked Exhibit "D" by the stenographer for identification, and is hereto attached and made a part of this record.

Q. I will ask you if you wrote a letter to Mr. John Mitchell, Esq., attorney for the Northern Pacific Railroad Company, on May 17, 1888.
A. I did.
Q. In reference to this matter?
A. Yes, sir; that was a copy of the letter that you have.

105 Q. Is that a copy or original?

A. I judge it is the original; I had a copy; that is the original.

Plaintiff, by counsel, offered and introduced in evidence the letter just referred to, which was objected to by defendant for the reason it was immaterial and irrelevant; which objection was overruled by the referee and the letter marked Exhibit "E" by the stenographer for identification, and is hereto attached and made a part of this record.

Q. I will ask you, Mr. Cowley, if on the same day you wrote a similar letter to Mr. Schultz.

Defendant, by counsel, objected to the last question for the reason it was immaterial and irrelevant; which objection was overruled by the referee; to which ruling of the referee defendant, by counsel, then and there excepted.

A. I did.

Q. When did you next see Mr. Mitchell after May 10th?

A. I saw him in the court-room on May 22nd.

Q. May 22nd?

A. Yes, sir.

Q. When did you first learn that a decree had been rendered in the case of the Northern Pacific Railroad Company against yourself in the district court?

A. Monday, May 21st.

Q. What time of the day?

A. Some time towards evening.

Q. Had you received before that any answer from Mr. Mitchell to your letter of May 17th?

106 A. No, sir. No, sir; I had not received any.

Q. Before that?

A. No, sir. I received a letter on Monday from Mr. Mitchell, notifying me——

Q. You need not tell that. Look at that letter and tell when you received that.

A. On the 21st.

Q. What time on the 21st?

A. Some time in the forenoon.

Q. Some time in the forenoon of the 21st?

A. I think it was. I am not certain.

Q. Did you also receive a letter from Mr. Schultz in answer to yours of the 17th?

A. Yes, sir.

Plaintiff, by counsel, offered and produced in evidence the letter just referred to, which was objected to by defendant for the reason it was immaterial and irrelevant; which objection was overruled by the referee and the letter marked Exhibit "F" by the stenographer for identification, and is attached hereto and made a part of this record.

Q. Look at that letter and see if it is the reply to your letter of the 17th to Mr. Schultz.

A. Yes, sir.

Plaintiff, by counsel, offered and introduced in evidence the letter just referred to, which was objected to by the defendant for the reason it was immaterial and irrelevant; which objection was overruled by the referee and the letter marked Exhibit "G" by the stenographer for identification, and is hereto attached and
107 made a part of this record.

Mr. MITCHELL: The ground of my objection, furthermore, is that it is a matter passing between Mr. Cowley and his counsel—purports to be—of which we know nothing and have shown we know nothing and don't claim we ever did know anything about it and are not bound by it. It is an agreement between Mr. Cowley and his counsel and has nothing to do with Mr. Cowley and the company. It is something by which we cannot be bound.

Q. You say you first learned of the filing of this stipulation and entering of the judgment on the forenoon of the 21st of May?

A. Yes, sir.

Q. What authority, if any, had you prior to that time given Mr. Ganahl or Hagan or either of them to enter into that stipulation and consent to that judgment?

Defendant, by counsel, objected to the last question for the reason it was incompetent, immaterial, and that the matter was a question of law and not of fact; which objection was sustained by the referee; to which ruling of the referee plaintiff, by counsel, then and there excepted.

Q. What conversation had you with Messrs. Ganahl and Hagan or either of them prior to May 21st or on that day touching the making and execution of any stipulation in regard to a settlement of that case or the filing of the same in court?

Defendant, by counsel, objected to the last question for the reason it was immaterial and incompetent; which objection was overruled by the referee; to which ruling of the referee defendant, by counsel, then and there excepted.

A. had no conversation touching it.

108 Q. What had you done prior to May 21st, 1888, as to the discharge of Ganahl and Hagan from any further connection with that case as your attorneys, if anything?

Defendant, by counsel, objected to the last question for the reason that the law of Washington Territory has provided a method for the discharge of attorneys and substitution of others, and that counsel and parties on the other side shall be notified of that discharge and substitution; that it can only be made by and through an order of court to that effect, and thereby it becomes a matter of record of the court as to — the discharge and substitution is competent and the best evidence, and for the further reason that the question is entirely immaterial; which objection was overruled by

the referee; to which ruling of the referee defendant, by counsel, then and there excepted.

A. I had written them a notice of their discharge and served it upon them in the Windsor hotel.

Q. You may look at that paper and say whether that is the notice.

A. It is the notice.

Defendant, by counsel, moved the referee to strike from the record the answer just given in regard to the discharge of the attorneys on the ground that the witness has stated that the matter of discharge was notice in writing, and that notice ist he best evidence; which motion was overruled by the referee; to which ruling of the referee defendant, by counsel, then and there excepted.

Plaintiff, by counsel, offered and introduced in evidence the document just referred to, which was objected to by defendant for the reason it was incompetent and immaterial; which objection was overruled by the referee; to which ruling of the referee defendant, by counsel, then and there excepted, and the document was
109 marked Exhibit "H" by the stenographer for identification, and is hereto attached and made a part of this record.

Q. You say you served that on the 17th?

A. Yes, sir.

Q. I will ask you to state, Mr. Cowley, what, if anything, was said in the conversation at your house on the evening of May 10th about where the papers closing up the proposed compromise were to be sent and who was to deliver them—if anything was said on that subject.

A. My understanding was that the papers were to be sent to the First National bank, and I should receive them, and to be in Mr. Glover's charge and I should receive them from him.

Q. From Mr. Glover?

A. Yes, sir.

Q. James N. Glover?

A. Yes, sir.

Q. I will ask you now to tell the court if you ever received any papers in regard to the matter or any money.

A. I have not.

Q. I will ask you if any papers have ever been tendered you by any officer of the railroad company or any person representing the First National bank in regard to that matter.

A. No, sir.

Q. I will ask you if any money was ever tendered you by any official of the railroad company or by any person representing that bank.

A. No, sir.

110 Q. Or by Mr. Glover?

A. No, sir.

Q. I will ask you if you had a conversation with Mr. Hagan prior to May 16th, at which Major Routhe was present, in relation to the

further prosecution of the case, or a settlement of it, prior to May 16th and subsequent to May 10th?

Defendant, by counsel, objected to the last question for the reason it was immaterial; which objection was overruled by the referee, to which ruling of the referee defendant, by counsel, then and there excepted.

A. I had with Mr. Hagan; yes, sir.

Q. I will ask you to state what was said in that conversation touching that question between you and Mr. Hagan, or on the part of either of you?

Defendant, by counsel, objected to the last question for the reason it was immaterial; which objection was overruled by the referee, to which ruling of the referee defendant, by counsel, then and there excepted.

A. I went up to Mr. Hagan's office to make a proposition to him for engaging associate counsel, and before we got into the conversation he asked me how I felt about the status of things, and if I was satisfied, and I told him I would have to confess I was not satisfied, and I believe I used the words "all broke up;" and he wanted to know what was the matter, and I told him I was not satisfied at all with your statement that there is an estoppel case, and he stated that if I wanted to repudiate the proposition of compromise I could do so, and we would go ahead and try it; and I asked him then if it would not be desirable under the circumstances, the way
111 the case had gone, to allow associate counsel to come in, and he stated that he couldn't allow associate counsel, that they were amply competent to try the case and didn't propose to be fooled with other attorneys and didn't want any other attorneys in the case; and then I stated to him that I had a larger interest than he had, that it was a fair proposition, that if I wished to have associate counsel I should be allowed to do so, and he repudiated the idea very indignantly and said he wouldn't have anything of the kind; and I then went to Major Routhe's office and asked him to come with me to Mr. Hagan's office to hear a statement as a witness, and he did so, and I introduced the subject in the room to Mr. Hagan, and he stated with some heat that he didn't want to hear about that any more; he said, "If you want to go ahead and have a trial you can do so, you have done nothing to bind yourself in this proposition, and we are in the case and propose to stay in it; we have the contract to try the case and propose to carry it out;" and there was some indirect conversation in relation to that point and we retired, Major Routhe and myself.

Q. Who was present?

A. There was no one but ourselves—Mr. Hagan, Mr. Routhe, and myself.

Q. When was this conversation?

A. That was on the 15th; it was on Monday. I don't recollect the day; it was on Monday.

Q. It was on Monday?

A. Yes, sir.

Q. After the 17th of May, when you gave Ganahl and Hagan this notice of discharge, you may state whether you had any fur-
112 ther conversation with them about this case at all.

Defendant, by counsel, objected to the last question for the reason it was immaterial; which objection was overruled by the referee, to which ruling of the referee defendant, by counsel, then and there excepted.

A. I met Mr. Hagan at the foot of the staircase in the Hyde block on the following day, that is, on Thursday, and he said he would like to see me in his office, and I told him I must decline to have any further conversation with him without a witness, and he said very well, and that ended it, and those were the last words I had with him.

Q. Did you have any conversation with Mr. Ganahl after that?

Defendant, by counsel, objected to the last question for the reason it was immaterial; which objection was overruled by the referee, to which ruling of the referee defendant, by counsel, then and there excepted.

A. No, sir.

Q. You may state if you had any conversation with Mr. Hagan on or about the 16th of May in regard to the arrival of papers?

A. Yes, sir.

Q. Where did you have that conversation with him?

A. In Judge Ganahl's office.

Q. On what day?

A. On the 16th, about 11 o'clock.

Q. What was that conversation? What did you go there for?

A. I went to get some of the papers on the case. I entered the office just as Mr. Glover was retiring, and after I was seated
113 Mr. Hagan said the consideration had arrived, Mr. Glover had brought it over and wanted to know if I would accept and look it over, and I told him I had not fully decided to accept or reject, and would have to wait until the afternoon before I gave him final answer, and made it until two o'clock when to give him my final answer.

Q. Did you give him a final answer at two o'clock.

A. I gave him the answer in Mr. Ganahl's office at that time. I stated that I had decided to reject the proposition and go forward with the case.

Cross-examination by Mr. MITCHELL:

Q. Who was your attorney in the original case, the first attorney who brought the suit?

A. Messrs. Griffitts, Stout, and Bain.

Q. You had consulted other attorneys about this case, had you?

A. Yes, sir.

Q. What others?

A. Judge Nash, the principal one, and Colonel Jenkins.

Q. That was before you employed Mr. Griffitts?

A. Yes, sir; I employed Judge Nash to counsel with him in regard to the advisibility of bringing the case into court, it was a matter of an examination of the question and didn't take any proceedings under him.

Q. When was that?

A. In the year 1883.

Q. When was it you employed Mr. Jenkins?

A. I didn't employ Mr. Jenkins, I simply counseled with
114 him in regard to the matter. He wished to examine the papers and attend to the case, and offered to give his help in the matter.

Q. How long was Mr. Griffitts your attorney in the case?

A. Over a year, something over a year. I employed them to look over the matter in 1885 and 1886, and they continued in the case until April, 1887.

Q. Who was next employed in the case?

A. Ganahl and Hagan.

Q. The same case that Griffitts had commenced for you?

A. Yes, sir.

Q. Mr. Griffitts was no longer continued in the case?

A. No, sir.

Q. What time of the day was the case set for on May 10th?

A. It was set for ten o'clock.

Q. Ten o'clock?

A. Yes, sir.

Q. When was it you first met Mr. Schultz on that day?

A. In the afternoon of that day, about half past three.

Q. Didn't you meet him in the forenoon at Mr. Newberry's office?

A. No, sir.

Q. Didn't you ask that the proposition which had been submitted — that you be allowed till the afternoon to consider it?

A. Yes, sir; I did. Mr. Hagan said he would have it referred until the next day.

Q. Who stated the proposition to you first?

A. Mr. Hagan.

Q. Who did he say it came from?

115 A. Mr. Schultz and yourself.

Q. Did he not say it came from me?

A. I said he included you both.

Q. Did he say who he had had the talk with about the proposition?

A. I understood he said he had been speaking with both of you.

Q. Did Mr. Schultz not say to you when you first spoke to him about the matter that he did not know exactly what proposition I had made?

A. No, sir; no; he gave me very clearly the proposition.

Q. You have already testified that you had told him what proposition had been made to you?

A. I asked him how he understood the proposition; I wanted to get at the facts, whether he and Mr. Hagan agreed in the matter. I didn't discover there was any discrepancy until after he had stated it.

Q. Didn't he tell you he wanted to see me and see what talk I had had with Hagan?

A. Yes, sir; that was with reference to putting the matter, the proposition, in writing. That was the only reference he made to you, that I asked him to put it in writing, and he stated he would have to consult you first.

Q. You never, at any subsequent time during that day or afternoon, asked him to put it in writing, did you?

A. No, sir.

Q. He never announced to you that he would not put it in writing, did he?

A. Yes; he did.

Q. Did he say that he had seen me about it?

116 A. No; he mentioned having had a conversation with you and must see you before deciding to put it in writing.

Q. When did he tell you he would put it in writing?

A. It was on the sidewalk in front of the First National bank, after we had started to go and find you in your rooms. He first said he could not do it without seeing you and then said we would go to find you, and on the sidewalk he stated he couldn't go; there was no use; if I accepted the proposition I would have to accept his word for it.

Q. Now, in connection with the arrangements which you afterwards made with Mr. Schultz and in all your subsequent talk about the settlement, you never asked him to put it in writing?

A. No, sir.

Q. The matter of compromise of this case—settlement of the controversies involved in it—had been considered by you before this 10th day of May, had it not?

A. The matter of compromise?

Q. Yes, sir.

A. Oh, yes, sir; it had been approached as early as October the previous year; another party, Mr. Rich and myself.

Q. You, in connection with your attorneys and by their advice and with their knowledge, made arrangements through another party to effect a settlement with the company, didn't you, prior to May 10th?

A. Yes, sir.

Q. Who was that party?

A. Mr. Phillip Ritz.

Q. This was done through your attorneys, Ganahl & Hagan, now, as it not?

117 Plaintiff, by counsel, objected to the last question as irrelevant, immaterial, and incompetent; which objection was overruled by the referee, to which ruling of the referee plaintiff, by counsel, then and there excepted.

A. Yes; that was done through them.

Q. Pursuant to that arrangement, Mr. Ritz went on to New York to look after it?

A. To close it up, I understood.

Q. Went there to see representatives of the company, did he not, concerning it?

A. Yes, sir; I understood he did.

Q. Please state, Mr. Cowley, the terms of settlement you proposed to make with the company at that time through Mr. Ritz.

Plaintiff, by counsel, objected to the last question for the reason it was immaterial, incompetent, and irrelevant; which objection was overruled by the referee, to which ruling of the referee plaintiff, by counsel, then and there excepted.

A. There were several propositions. One was a proposition to either give or take $45,000 for the claim, and if they bought the company was to pay $45,000 and reserve to us fifteen acres of land, or we would give the company $45,000 for the whole claim.

Q. What was the second proposition?

A. To divide the land east and west, and the company deed the east half to me and I deed the west half to the company.

Q. Mr. Ritz made those propositions, did he not?

A. He wrote to me to that effect.

Q. He was acting under the instructions of your attorneys in that connection?

118 A. No, sir; he was on his own behalf. I gave authority to my attorneys to draw up a power of attorney for him; he had made the proposition three times to me, and finally I reached that understanding.

Q. You say, however, the business was done through them?

A. Yes, sir.

Q. Had you not made offers to the company before that relative to it?

A. Yes, sir.

Q. State what they were and when and to whom they were made.

A. In 1884 I made a proposition to the company, and at the suggestion of Mr. Schultz, to give the company one-half and allow me to have the other half at $2.60 per acre. Mr. Schultz thought he could effect that agreement in writing.

Q. To whom did you make that proposition?

A. The proposition was made to—I think it was addressed to Mr. Lamborn, at St. Paul.

Q. Lamborn was commissioner of the land department of the company?

A. Yes, sir.

Q. You made offers to the company what you were willing to do?

Plaintiff, by counsel, objected to the last question for the reason it was not cross-examination; which objection was overruled by the referee; to which ruling of the referee plaintiff, by counsel, then and there excepted.

Q. I will ask you this question, Mr. Cowley: Did you ever make any proposition to the company relative—about money being paid in addition to this you have mentioned?

119 A. Yes, sir.

Q. State it.

Plaintiff, by counsel, objected to the last question for the reason it was immaterial, improper, and not cross-examination; which objection was overruled by the referee; to which ruling of the referee plaintiff, by counsel, then and there excepted.

A. I made them a proposition to Mr. Lamborn to complete my engagement with the company for the purchase of the land, offering the company $1,000 extra above the price of the land per acre in consideration of the company having paid $2,000 to the Indian for his rights, and with the idea that the company had given the Indian a liberal offer for the land, and feeling that I did not want to embarrass them in my action in the matter with the Indian.

Q. In addition to this thousand did you not offer to pay a considerable price for the land?

A. Yes, sir, I did. I considered the land might be worth more to the company than $2.60 per acre, and was willing to pay a higher price to get it settled in one or two years after the time according to the stipulation of the sale.

Q. Do you remember what year that was you made that proposition?

A. That was in 1883.

Q. Now, in this proposition that was made to you on the 10th day of May, or in any proposition that was made to you on the 10th day of May, was anything said about your paying anything as a price for this land?

A. Yes, sir; there was a price.

Q. Well, what was that?

120 A. In 1886——

Q. I mean May 10th; in any of those propositions made on May 10th.

A. What was the question?

Q. Was there in this proposition made on May 10th or in any proposition made on May 10th in regard to a settlement of this controversy, was any allowance made or documents spoken of from the amount to be paid you for the price, the original price which you were to pay for the land?

A. No, sir; nothing said about that.

Q. Then, as I understand it, this proposition was to pay you $8,000 and give you seven and one-half acres of land without regard to any price to be paid by you therefor?

A. Nothing said about the price per acre. Mr. Hagan figured the amount, including thirty lots at $500 a lot. That is all that was said about the price. There was nothing said about the price per acre.

Q. What was the occasion of your meeting at Mr. Ganahl's office

at eight o'clock in the morning when the hearing was not until ten o'clock?

A. Mr. Ganahl had requested me to come down so as to go over the case from the beginning and thoroughly establish the fact that we thoroughly understood it, so to refresh ourselves.

Q. Never had an occasion to go over it fully before?

A. Yes, sir; we had gone over it a number of times, but it had a large number of points, and we had a large number of appointments with Ganahl to consider the case—the different points.

121 Q. You had discussed the matter of settlement with him quite a number of times previous to that, had you not?

A. Yes, sir.

Q. And also with Judge Hagan?

A. Yes, sir.

Q. You had been making an effort for years to make a settlement of this case?

A. I had; yes, sir.

Q. What was the occasion for adjourning the case over from ten o'clock until afternoon without taking testimony?

A. Mr. Ganahl said Mr. Hagan was having a conference with Mr. Schultz and yourself; that you had arrived some time that morning, and it was postponed until two o'clock; that they were not ready; the case had been adjourned until two o'clock; so I was told by Mr. Ganahl in the forenoon.

Q. Did he not state to you the proposition that had been made?

A. Mr. Ganahl?

Q. Yes, sir.

A. No, sir; he said he knew nothing about it.

Q. Who told you to bring your wife down in the afternoon?

A. Mr. Ganahl.

Q. What did he say he wanted her for?

A. He said that Mr. Hagan had just had a conference with him, and there was a proposition of compromise to be offered to us and he wanted to have her present.

Q. He didn't state, then, what the proposition was—didn't tell you?

A. Mr. Ganahl didn't tell me; no, sir.

122 Q. Did you know about it before you went up to bring your wife down; did you know what it was?

A. No, sir.

Q. Did Mr. Ganahl say why he wanted her down there?

A. He wanted her to be present to listen to the proposition.

Q. You didn't try to find out what the proposition was before you went to your wife?

A. No, sir.

Q. You didn't tell her when you went up what it was?

A. No, sir.

Q. When did you come down in the afternoon?

A. About quarter past one.

Q. Quarter past one?

A. About that time.

Q. You had gone home to lunch?

A. No, sir; I took lunch down town.

Q. When did Ganahl first tell you there was a proposition of compromise?

A. After I returned from lunch I met him in the hall at the office and he and Hagan were just coming out, and Hagan passed and Ganahl stopped me and asked me if my wife was ready to come down and if she — it would be very desirable to have her come, for there was to be a proposition of compromise offered that afternoon and to bring her right down.

Q. Did you inquire at ten o'clock when the case was to be called; why it was not called?

A. I understood we were to occupy that same office, and we were *and we were* not quite prepared, not quite ready; that is the
123 way Mr. Ganahl represented it to me. He had just got in and had some other business to attend to first.

Q. Who was present when Mr. Ganahl had the talk with you in the morning?

A. There was no one present; there were occasional callers at the office, but no one listened to our review of the case.

Q. Who was present when Mr Ganahl stated to you the proposition of compromise?

A. Mr. Ganahl did not state the proposition to me; Mr. Hagan did that.

Q. Well, who was present?

A. Messrs. Ganahl and Hagan and my wife and Mr. Havermale, Mr. Newton, and Mr. Maxim.

Q. Did Mr. Ganahl have anything to say in connection with it?

A. Yes, sir.

Q. Well, what did he say?

A. Shall I repeat the conversation? I stated this morning what the conversation was, so it is on record now.

Q. State it over again.

A. Well, after we were seated Mr. Hagan said that he had called us to listen to a proposition of compromise which had been made by the company through Mr. Schultz and Mr. Mitchell, and stated all the case and gave the terms; that the company offered $8,000 in cash and thirty lots in land; about thirty lots which he considered worth $500 a lot, and it would make the compromise worth to us $23,000, and he would proceed to advise us to accept it; that there was a weak point in the case, and it would not stand
124 the test of the court, and we should certainly be beaten if we took it to trial. I argued the matter with them; why they didn't apprise me of that before, and Mr. Hagan said he had been canvassing it for a month past and Mr. Ganahl thought there was nothing in that point and had insisted on carrying it forward, but that that day he had consulted and agreed with him; that Ganahl had agreed with him that it was as he represented before. That was the subject of that proposition and conversation.

Q. These thirty lots were included in the seven and one-half acres, were they not?

A. Yes, sir.

Q. The seven and a half acres referred to was where your house was located?

A. Yes, sir.

Q. Where you live?

A. Yes, sir.

Q. How many times that day did you see Mr. Schultz?

A. I saw him twice.

Q. Why did you want him to go up to your house?

A. That was Mr. Hagan's proposition. I didn't ask them to go up to my house.

Q. Didn't you tell them something about your wife wanting to make some arrangement with him about church lots?

A. As stated to Mr. Hagan, my wife had spoken about a couple of lots for a parsonage for the church, and that might make some difference on her mind about accepting the proposition, and in that way it was given him the benefit of the information, and he then said he would have Mr. Schultz go up and arrange with her
125 about that matter—that she should have the lots.

Q. About what time was it you got up to the house?

A. It was about nine o'clock.

Q. You and your wife had been considering the matter of settlement during the afternoon, had you not?

A. Yes, sir.

Q. They were there, then, about an hour at the house?

A. About an hour.

Q. Who stated the proposition at the house?

A. Mr. Schultz.

Q. It was gone into considerably in detail, was it not—talked over?

A. Yes, sir.

Q. You, your wife, Mr. Schultz, myself, and Judge Hagan all talked at various times about different portions of the proposition, each had something to say about it?

A. I don't remember that you spoke in regard to this proposition. You and I had some conversation in regard to other matters. We didn't enter into details about it. Mr. Schultz was the principal speaker in the matter—Mr. Schultz and Mr. Hagan.

Q. Mr. Schultz and Mr. Hagan?

A. Yes, sir.

Q. After Mr. Schultz stated the proposition it was discussed fully, was it not?

A. Yes, sir; it was.

Q. How many times did he state it distinctly?

A. Well, I can't state that he stated it more than once. He might have referred to different parts of it at different times,
126 but more than once I can't say. I can't say he went over the ground more than once, except possibly referring to parts of it.

Q. Didn't he state that proposition as much as three times distinctly, the whole of it?

A. Not that I recollect.

Q. You wouldn't swear positively about that?

A. No, sir.

Q. Now, Mr. Cowley, there was some handshaking there. I will ask you to proceed to describe that.

A. Mr. Schultz, after finishing the conversation, arose and proposed to shake hands over it, and at that proposition each of us gave our hands, not so much as a matter of pledge, but as a matter of courtesy.

Q. Was it not a proposition of his?

A. Yes, sir; that was his proposition.

Q. To bind the matter by shaking hands on it?

A. I understood it that way.

Q. And you proceeded to act accordingly?

A. Yes, sir.

Q. He told you when he would send the papers and the money?

A. Yes, sir.

Q. What date did he set as the day when he would send the papers and the money?

A. Six days following, the following Wednesday.

Q. What date was that?

A. Wednesday would be the 16th.

Q. Now, it was arranged during the afternoon, was it not, that if this proposition was not agreed to Mr. Schultz and myself
127 would remain and go on with the case the next day; that if it was agreed to we were to go home that night?

A. Yes, sir.

Q. Mr. Schultz stated why the papers would not be there before the 16th, did he not?

A. He said they were crowded with business and couldn't get them ready before the 16th and return them.

Q. Did he tell you he was going to stop somewhere on the way home?

A. I can't recall.

Q. It was arranged, was it not, at that time, how these papers should be executed?

A. No, sir.

Q. You told him where to send them, did you not?

A. No, sir.

Q. It was arranged where they should be sent, was it not?

A. It was; it was Mr. Schultz's proposition that we send them to the First National bank.

Q. That was agreed upon, was it not?

A. Yes, sir; I understood that.

Q. Mr. Hagan was there acting for you at that time—acting as your attorney—was he not?

A. Yes, sir.

Q. Did Mr. Schultz not give me certain directions concerning the matter in your presence?

A. He may have done so; I can't recall.

Q. Did he not tell me about payment of costs in the case?

A. Yes, sir; I spoke about that; that point was settled;
128 Mr. Schultz said the costs in the case would be paid by the company.

Q. In that proposition what was said about the disposition of the case in court?

A. I can't say what was said about that. I have an impression it was spoken of as having been discontinued.

Q. Was there not some conversation had between Mr. Hagan and myself in your presence in regard to that?

A. No; I can't recall it.

Q. Did not Mr. Schultz say in your presence that the case would have to be disposed of in some way or other, and didn't either Judge Hagan or myself remark that we could arrange that between ourselves—the attorneys could arrange that—as it was simply a formal matter?

A. You might have said so; I can't say to the contrary.

Q. And was not that understood, that that should be done?

A. My general impression is something of that kind would take place.

Q. That Judge Hagan and myself would fix up the papers, so far as the case in court was concerned?

A. Yes, sir. I expected Mr. Hagan to go through with the case.

Q. These papers to be forwarded from Tacoma were to be drawn by myself, subject to the direction of Judge Hagan when they arrived?

A. I can't state about that.

Q. Was not something there said about my going home and not being able to return until the term of court would commence, and that the matter of formally signing any papers, so far as the case on record was concerned, would be postponed until that day?

A. I can't say about that. I didn't pay any attention to your conversation with Judge Hagan.

129 Q. It was in your presence and hearing?

A. I can't say. I presume whatever was said was in my hearing.

Q. We had considerable talk about that matter, didn't we?

A. You may have had.

Q. Was it not then and there arranged how it should be done?

A. I didn't so understand it.

Q. And that the formal papers should be signed when I came up, so far as the case was concerned?

A. I suppose that you would act in behalf of the company, whatever was necessary to be done.

Q. Wasn't it talked of there at that time?

A. I don't remember. I will say this, Mr. Mitchell—that after the main point was in a measure decided, I didn't give very much attention to the conversation between yourself, Mr. Schultz, and Mr. Hagan.

Q. You considered the whole matter was well settled, and that all the formal matters could be arranged between Mr. Hagan and myself?

A. I understood the matter like this, Mr. Mitchell——

Q. Answer my question.

A. Yes, sir; there was one point I did not consider settled.

Q. I am asking you—you said after the main matter had been determined on you didn't listen attentively to the other matters?

A. No, sir; I did not.

Q. This proposition was gone into considerably in detail, was it not?

A. The matter was clear before our minds. Yes, sir.

Q. Even to the matter of a reservation for the right of
130 way for the water pipes across the seven and one-half acres you were to retain. Even that was talked about?

A. Yes, sir.

Q. And the matter of springs upon the land?

A. Yes, sir.

Q. And the cleaning out of the springs—that is, about the necessity of cleaning them out?

A. I presume—I can't recall that.

Q. All these details were arranged for, were they not?

A. The details that I understand were arranged for was the consideration for the closing of the suit, and in regard to the details of the final papers I never understood was arranged there. I said my impression about that matter was that when the consideration arrived that then I would be called upon to sign certain papers in the matter and I dropped the subject, and I expected, of course, to confer with Judge Hagan in the final arrangements.

Q. These papers did come, didn't they?

A. I never saw them.

Q. You were notified of their receipt, were you not?

A. Yes, sir.

Q. By Mr. Glover?

A. No, sir; those received by Mr. Ganahl, Mr. Hagan told me.

Q. You were notified that they had been received by Mr. Glover at the bank?

A. Yes, sir.

Q. Where by arrangement they were to be left?

A. Yes, sir.

Q. They were received there on the same date, were they
131 not—both money and papers? It was agreed upon as the date that they were to be there?

A. That is what I understood; yes, sir. I believe so. I simply have Mr. Hagan's statement for it.

Q. You were told they were there for your examination, were you not?

A. Yes, sir.

Q. That was on the 16th—the day on which they were to arrive?

A. Yes, sir.

Q. You have never been notified by the company or any of its representatives that the money or those papers had been withdrawn from the bank, have you?

A. No, sir.

Q. Did not Mr. Hagan and myself keep pretty close notes of the talk that was had between you and your wife and Mr. Schultz?

A. Possibly you did. I didn't notice you taking notes.

Q. Didn't we frequently interrupt and ask questions?

A. I can't say.

Q. Did I not on several occasions?

A. I can't recall that.

Q. Did I not on several occasions during that talk ask to have certain matters repeated, so I could thoroughly understand them?

A. I can't recall that.

Q. And were they not so repeated?

A. I can't say.

Q. Is it not a fact, Mr. Cowley, that whenever anything came up that any one did not understand—either yourself or your
132 wife, myself or Judge Hagan or Mr. Schultz—that it was spoken of and the matter was then discussed?

A. Oh, yes, sir.

Q. Then, finally, the point came when we ceased to ask any further questions about understanding the matter, and the whole matter was agreed upon?

A. Yes, sir.

Q. Then the handshaking began?

A. That closed the conversation.

Q. Judge Hagan was going away also that night, was he not, on some business?

A. I don't remember about that. Yes; I think he was intending to go that evening; he went down to Sprague.

Q. Was there not some one else present in the room while we were talking besides your wife and the children you have named?

A. No, sir.

Q. No male portion of your family but yourself?

A. No, sir.

Q. Did you not, Mr. Cowley, speak there quite frequently on the strained relations which had existed between you and the company?

A. Yes, sir; I had some conversation with you about the matter, especially with yourself.

Q. And spoke about being glad that everything had been satisfactorily adjusted?

A. I don't think I expressed any pleasure at that adjustment.

Q. Did you not refer to the fact of the relations existing between yourself and the company being once more harmonized?

133 A. I can't recall that. I said I would like to be in harmony with the company, and had always tried to be.

Q. You would not swear that you did not make such a statement as that referred to?

A. Well, I think it very doubtful that I did say that I was very glad that the adjustment had been made. I doubt that very much.

Q. You had never sent any notice to the company relative to -ejecting—making any statement about rejecting any propositon until about the 16th, did you?

A. Yes, sir; I notified the company on the 15th by letter and on the 16th by telegram that I must have more time for consideration.

Q. What date was that telegram?

A. It appears to me it was on the 15th.

Q. Did you send any telegram before the 15th?

A. It was Monday.

Q. Did you send any telegram before the telegram that was introduced in evidence here this morning?

A. No, sir; the first telegram I sent was, I must have further time for consideration from the company.

Q. That was the first one you sent?

A. Yes, sir.

Q. That was the telegram, "We must have additional time to consider your proposition of compromise"?

A. Yes, sir.

Q. That was what day?

A. It must have been Tuesday.

Q. Now you say that it was Monday that you were in Mr. Ganahl's or Mr. Hagan's office with Major Routhe?

134 A. Yes, sir.

Q. And you were then discussing the proposition of having additional counsel in the case and fighting the case?

A. Yes, sir.

Q. And yet on Tuesday you sent this telegram that you must have further time to consider the case?

A. Yes, sir.

Q. Well, now, if you were getting additional counsel to fight the case on Monday, why did you send this telegram on Tuesday?

A. I shall have to go back, Mr. Mitchell, to state that point. I put the responsibility of the acceptance of the proposition on Mr Hagan's honor; not having stated the law point clearly to me that would beat the case, I gave him to understand that if I found out that he was not stating to me properly, I should retract.

Q. Then, you relied upon the responsibility and reliability of your attorney, Judge Hagan?

A. Yes, sir.

Q. In making this settlement?

A. Yes, sir.

Q. You did so all the way through even up to the time Mr. Schultz and I left?

A. Yes, sir.

Q. You had employed Judge Hagan to exercise his ability and responsibility in the case, had you?

A. I had employed him to litigate the case for me.

Q. Then you never sent any notice to the company that you no longer relied upon the responsibility and liability of Judge Hagan until after you were notified that these papers and money had been received?

135 A. I telegraphed you that I had employed other counsel.

Q. Well, that was not before the 17th?

A. No, sir.

Q. You say on the 16th that you took until the afternoon to consider what you should do with these papers and money, did you not?

A. Yes, sir.

Q. Now, on the 14th when you were considering the matter and insisting on employing additional counsel and insisting upon their being retained, you knew that under the arrangement with Mr. Schultz that these papers must then be upon their way, did you not?

A. I knew that if he did as he agreed to they would probably be upon the way.

Q. You didn't take any steps to notify him that you were procuring other counsel?

A. Not until afterwards.

Q. Why were you so anxious to have additional counsel at that time before those papers had arrived?

A. I discovered that Ganahl and Hagan had not properly represented the case to me, and it would be difficult, perhaps, to pursuade them to retire from the case, and I would be better able if I had a contract with them to have additional counsel.

Q. Who told you anything on Monday that you didn't know on the Friday previous; on the Thursday previous?

A. There were several lawyers spoke to me in regard to the matter; Mr. Griffitts, for one, said that he was positive that Hagan had let it go on that point, as he had gone over the whole ground with Judge Ganahl on that point, and they thoroughly agreed, and he considered the point not well taken by Ganahl and Hagan; that he would have had no difficulty in that matter.

136 Q. Yet had gotten out of the case?

A. Yes, sir.

Q. You discussed not only the legal point involved in the case, but the matter of the amount, with several citizens, didn't you?

A. The matter of the amount?

Q. Yes; the amount you were to receive. You discussed that freely with quite a number of citizens after Mr. Schultz and I had left?

A. Oh, yes, sir.

Q. Did you not do so on the morning after Mr. Schultz and myself had left?

Plaintiff, by counsel, objected to the last question for the reason it was incompetent; which objection was overruled by the referee, to which ruling of the referee plaintiff, by counsel, then and there excepted.

A. I think I did.

Q. Didn't you tell some of them you were glad it was settled?

Plaintiff, by counsel, objected to the last question for the reason it was incompetent; which objection was sustained by the referee, to which ruling of the referee defendant, by counsle, then and there excepted.

A. I stated that I was glad the controversy was out of the way. In that respect I was glad.

Q. Glad that the controversy was out of the way and at an end?

A. Yes, sir.

Q. You knew that Ganahl and Hagan were still acting for you on the first day of the term of court, did you not?

A. Yes, sir; they claimed to.

137 Q. I asked you if you knew it.

A. I had notified them they were discharged and I didn't expect them to act for me; they sent me a bill.

Q. Did you not know that Ganahl and Hagan were acting for you in the case on the first day of the term of court?

A. No, sir; I did not know it. I didn't imagine they would have done so after my notice. I knew they would probably attempt to act for me.

Q. You never looked at those papers that were sent by Mr. Schultz?

A. No, sir; I never saw them.

Q. Now, when the talk that was had at the house, you and Mr. Schultz talked over the precise boundaries of these seven and one-half acres, didn't you?

A. Oh, yes.

Q. And also how the streets would run?

A. Yes, sir; I think that was mentioned.

Q. It was also stated the object in giving you that particular seven and one-half acres, was it not?

A. I can't recollect about that; I suppose I pretty thoroughly understood the object, but don't know whether it was stated or not, about the filing of the boundaries of that particular part of the claim.

Q. What would that seven acres and a-half include—what is located upon it?

A. It is partly on the south half of the northwest quarter and northeast quarter of the southeast quarter; it runs over the

138 line—that is, it runs on each side of the line between the two forties.

Q. What is located upon that seven acres and a half—what was there at that time?

A. I can't recall whether it was spoken of and how much was on each forty-— tract.

Q. On the seven acres and a half, what buildings, etc.?

A. Part of our residence — on the line between section 18 and 20, an orchard, strawberry patch, raspberries, &c., and some tilled land and fencing.

Q. Included all the improvements that were located upon the tract in controversy, except such as had been placed there by squatters?

A. No, sir; it didn't include all of them.

Q. What portion did it include?

A. The larger portion, probably; at least four-fifths of the improvements.

Q. Four-fifths of the improvements?

A. Yes, sir

Q. Now, when the adjournment was made at two o'clock in the afternoon, to what day was it adjourned?

A. I don't know as there was any arrangement. I didn't hear of any arrangement.

Q. Well, what did you understand?

A. I understood this: That in the event of our not accepting the proposition the case would go forward the next day, so far as I knew of the matter. I don't recall any time being specified.

Q. You had until the next day to look into the matter and discuss it with your wife and determine it, did you not?

139 A. No, sir; Mr. Hagan insisted on having the thing closed up that day.

Q. Mr. Hagan did?

A. Yes, sir; he says, "We have Mr. Schultz here now and will make him leave the papers and have them signed while he is here, so they won't get out of it."

Q. Did he insist on Mr. Schultz signing the papers and fixing them up at your house in his presence?

A. No, sir.

Q. Did you insist on it?

A. No, sir.

Q. You say in your testimony that you expected Mr. Hagan to fix up the papers when the consideration had arrived?

A. Yes, sir.

Q. What papers did you refer to?

A. I supposed there would be a quitclaim deed to sign and statement of the consideration in some shape and my expenses of it.

Q. Well, you have testified already about an arrangement of Mr. Schultz sending the papers along with the consideration. What papers were those?

A. I said those are the papers I expected Mr. Hagan would close with him.

Q. What papers was Judge Hagan to draw if Mr. Schultz was to send them?

A. I, of course, never had any experience in these matters beforand I can't tell.

Q. Have you not already testified that it was understood that I should draw those papers at Tacoma and send them?

140 A. No, sir; I haven't testified that.

Q. Isn't it a fact, Mr. Cowley, that you are quite well acquainted with the necessary papers to be drawn in a case of that kind?

A. I have some general idea, but no experience.

Q. Hav-n't you been a man of considerable business affairs in your time?

A. Oh, yes.

Q. Hav-n't a good deal of this class of business come under your observation in connection with your business?

A. No, sir; nothing of this character at all. Mr. Schultz spoke

about a certificate for a deed, something which I have never seen, and I can't say what it was for, and I supposed a warranty for the seven acres that the company were to concede to us would be given.

Q. Under this arrangement were you to continue right along in possession of the seven acres and a half?

A. Yes, sir.

Q. As a matter of fact your possession of that seven acres and a half has never been disturbed?

A. Oh, no; I don't know that it has been. There have been lots sold in that vicinity, but not very close. I have heard some one say lots have been sold inside of my enclosure.

Q. You have never sought to inquire about that?

A. No, sir.

Q. You have been disturbed in possession of the other tract, have you not?

A. Oh, yes.

Q. You have got all of this seven and a half?

A. Not all; there is a large piece yet that is occupied by
141 squatters.

Q. I mean by the company?

A. The company have not disturbed me in any shape.

Q. You have been served with papers under this decree, have you not, relative to all but the seven and one-half acres?

A. No, sir.

Q. You have been served with papers through your agent, representative?

A. No, sir.

Q. You know of the sheriff taking possession under that decree?

A. I heard he had; that he was on the property for the purpose of it. I was away at the time.

Q. That was what brought about the filing of the complaint in this case, was it not?

A. No, sir.

Q. It was not filed before that occurred, was it?

A. I can't recollect. The complaint was filed immediately after the papers had announced that the matter had been closed between us and the land was open for sale. I was not here at the time.

Q. Ganahl and Hagan had advised these previous settlements that you refer to, had they not?

A. They stated that they would always advise a compromise if we could secure it. They were always ready for a proposition of compromise on the subject if the matter could be closed up by compromise. It was better than to continue in the litigation.

Q. You had always been favorable to compromise, had you not?

A. Yes, sir.

Q. The company had never made you so good an offer before, had they?

142 A. No, sir; that was the best offer they had made.

Q. You had discussed with Ganahl and Hagan about what the matter could be settled for?

A. Yes, sir.

Q. You had some idea of what the company would probably be willing to do, had you not?

A. No, sir; I did not have any idea.

Q. You had discussed with them the probability of the company doing something within certain limits, had you not?

A. I think you have repeated that question several times.

Q. I don't know but what I have.

A. We made a proposition through Mr. Ritz.

Q. You can say you did discuss with Messrs. Ganahl and Hagan within what limits the matter could probably be settled up?

A. Yes, sir.

Q. I will call your attention again to where you testified about your expecting Judge Hagan to fix up the papers. You mean, I suppose, that he was to inspect and approve such papers as were sent?

A. As would be proper in closing the matter; that is what—what I would authorize him to close it.

Q. Now, these papers, you say, were received at the bank of Mr. Glover?

A. So Mr. Hagan said.

Q. You expected to get them through your attorney, did you not?

Plaintiff, by counsel, objected to the last question for the reason it was incompetent; which objection was overruled by the referee; to which ruling of the referee plaintiff, by counsel, then and there excepted.

143 A. I expected them to be directed to me.

Q. And yet you had an attorney looking after the business, did you?

A. Certainly.

Q. Knowing that they had arrived on the 16th, you never went to the bank to get them, did you?

A. No, sir; I didn't know absolutely that they would arrive on the 16th.

Q. You had been informed that they had been sent so as to arrive on the 16th?

A. Yes, sir.

Q. Mr. Schultz told you that?

A. Yes, sir. I did not care to go to the bank; it was not necessary. Mr. Hagan told me they had arrived.

Q. Never sent any agent or representative there to get them, did you?

A. No, sir.

Q. You didn't look over the papers or satisfy yourself that the money was on hand, but took Judge Hagan's word for it, while you were considering the matter from the forenoon to the afternoon on the 16th?

A. Yes, sir.

Q. You didn't know that on the afternoon of the 16th when you notified Judge Hagan of your determination—whether these papers were in accordance with the agreement or not?

A. No, I didn't know, of course; I didn't see them and didn't know.

144 Q. You say Mr. Glover was just going out of the office as you went in?

A. Yes, sir.

Q. That was immediately prior to the notification by Mr. Hagan?

A. Yes, sir; that they had arrived.

Witness excused.

145 GAZENOVIA COWLEY, called for the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. BLAKE:

Q. You are the daughter of H. T. Cowley, are you?

A. Yes, sir.

Q. How old are you?

A. Thirteen.

Q. Did you ever see that gentleman before (pointing to Mr. Mitchell)?

A. Yes, sir.

Q. About when?

A. He was at our house on May 10th.

Q. About a year ago?

A. Yes, sir.

Q. Who did he come there with?

A. Mr. Schultz, Mr. Hagan, and Mr. Cowley.

Q. What time of the day was it?

A. About half past nine; between nine and ten.

Q. At night?

A. Yes, sir.

Q. Did you hear any conversation there between the parties?

A. Yes, sir.

Q. Were you in the room?

A. I was.

Q. Go ahead and tell now as near as you can what you remember of that conversation. What did Mr. Schultz say, if anything?

A. I don't remember what he said, all he said.

146 Q. Do you remember anything that he said?

A. Yes, I remember some things.

Q. Go ahead and tell.

A. He came up and said he came up to see if they entirely understood the thing, and sat down and talked about the different matters, and mamma asked for three lots for the parsonage, and he said she might have them and he would pay for them himself, and then he said—and then something came up about whether he would fix the papers that day, and he said he would rather have them take his word for it, and that is about all I remember that he said.

Q. What was said about when the papers would be fixed, if anything was said about that?

A. He said that they would be sent on Wednesday to the First National bank, and that they would be signed and fixed.

Q. What was said, if anything, about Mr. Ganahl or Hagan or either of them signing an agreement or stipulation and filing it in court?

Defendant, by counsel, objected to the last question as leading; which objection was overruled by the referee; to which ruling of the referee defendant, by counsel, then and there excepted.

A. I didn't hear anything said about that.
Q. Were you present all the time they were there?
A. I was out of the room about five minutes.
Q. What time of the conversation were you out of the room?
A. I don't remember what they were talking about when I left, but I think about the water, having it cleaned out, but I don't exactly remember what they were talking about.

147 Q. How long were they there?

A. I think they went away about 11 o'clock; somewhere near there.

Q. Were you out of the room the first part of the conversation or the last?

A. It was about the middle of the conversation. I came back and stayed until they were gone.

Cross-examination by Mr. MITCHELL:

Q. About what time did you say they came up there?
A. Between nine and ten.
Q. What time do you usually go to bed?
A. About half past eight.
Q. You were pretty much all lying around on sofas, &c., when we went up there?
A. No, sir.
Q. You were rather sleepy then? It was some time after your bedtime?
A. I was not sleepy.
Q. You were not accustomed to sitting up that late at that time?
A. Not usually, but had done so a great many times.
Q. Where were Mr. Schultz and your mother and father, myself and Judge Hagan, seated in the room?
A. Near the table.
Q. That table was near the door, wasn't it?
A. Yes, sir.
Q. That was quite a large room, that front room?
A. Yes, sir.
Q. The children were pretty well back in the room?

148 A. Yes, sir.

Q. These people I have mentioned were gathered in a group around the table, were they not?
A. Yes, sir.
Q. You were some little distance away from them?
A. A few feet; not far.
Q. In the other part of the room?
A. Just opposite.

Q. There was some one sick there at the time, wasn't there, in the room?

A. No, sir.

Q. Sure about that?

A. I am sure.

Q. You don't claim to hear all that was said there?

A. I heard the larger part of what was said.

Q. You don't claim to have heard all that was said while you were in the room?

A. Every word. I heard it, but don't remember all of it.

Q. Who did the most of the talking?

A. Mr. Schultz and Mr. Cowley and Mrs. Cowley.

Q. You never saw me before, did you?

A. No, sir.

Q. Nor since?

A. I don't think I have seen you since.

Q. Until today?

A. I don't think so.

Q. Well, do you remember me as a party that was there?

A. Yes, sir.

149 Q. Did I wear a beard then?

A. Yes, sir.

Q. Sure of that?

A. Yes, sir.

Q. Did Mr. Schultz wear a beard then?

A. Yes, sir.

Q. You think you recognize me, then, as the same man that wore a beard that night?

A. Yes, sir.

Q. Who said that they came up there to see if they entirely understood the matter?

A. Mr. Schultz.

Q. Yet your father and Judge Hagan were in the same carriage with him, were they not?

A. Yes, sir.

Q. Who spoke about fixing the papers that day?

A. Mr. Schultz.

Q. Who asked him to do it?

A. I don't remember.

Q. Did anybody ask him to do it?

A. I don't remember what was said about it, but I remember what he said.

Q. He mentioned it when I went to speaking to him about it?

A. I said I don't remember whether he did or not.

Q. How do you happen to remember that he spoke about it?

A. I don't remember how I happen to, but I remember about his speaking about it.

Q. They were there about an hour and a half?

150 A. I think it was about that time.

Q. Wasn't Mr. Schultz talking with your mother at the same time I was talking with your father?

A. I don't remember that papa talked to you at all.

Q. I talked to Judge Hagan some, did I not?

A. I think you did about the paying of the court expenses.

Q. The others were talking at the same time I was talking with him, were they not?

A. I think not.

Q. Now, there were sets of two talking at the same time during that conversation?

A. No, sir.

Q. Anything that was said by any one of the number was said so that all could hear?

A. Yes, sir.

Q. You have stated all that you remember of hearing?

A. Yes, sir; of any importance. I heard a few things that don't amount to much.

Q. Did you hear Mr. Schultz state any proposition of what he was willing to do or what he would do or the company would do?

A. Nothing but the lots for the parsonage. He would buy those with his own money.

Q. That was a personal matter of his own?

A. Yes, sir.

Q. Didn't he say he wanted that to be considered as his contribution to the church?

A. Yes, sir.

Q. You don't remember any other proposition he made?

151 A. No, sir.

Q. Didn't state anything about how much land?

A. Oh, yes; he would give about seven acres and a half and $8,000 in money.

Q. You remember all that?

A. Yes, sir.

Q. That was fully discussed when he spoke about it?

A. Yes, sir.

Q. That was done in the way of agreeing to this proposition?

A. The folks shook hands over it.

Q. Who did that?

A. I think they all did.

Q. Who proposed that?

A. Mr. Schultz.

Q. What did the others say to it?

A. I don't remember what they said to it, but I remember they shook hands.

Q. That was just after he proposed that?

A. Yes, sir.

Witness excused.

152 GRACE COWLEY, called for the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. BLAKE:

Q. What is your name?

A. Grace Cowley.

Q. You are a daughter, are you, of H. T. Cowley?

A. Yes, sir.

Q. Were you present when Mr. Mitchell and Schultz, Mr. Hagan and your father came home one night last May?

A. Yes, sir.

Q. How did they come?

A. Came in a hack.

Q. What time of the night was it, about?

A. It was about nine o'clock, some time.

Q. Well, now, just go ahead and tell—they came into the house, did they?

A. Yes, sir.

Q. Go ahead and tell what you remember of the conversation.

A. They came and talked of different things a little while, and then they stated their proposition.

Q. Who stated it?

A. Mr. Schultz.

Q. Go on.

A. He said that they would give papa seven acres and a half and $8,000 as a compromise.

Q. Go ahead and tell anything else that was said that you remember. Was that statement made more than once?

153 A. Not that I know of.

Q. What was said, if anything, about lots for a parsonage?

A. Mr. Schultz said he would give three lots for a parsonage and pay for them himself.

Q. Anything said about the water?

A. Yes, sir; they asked if they would have the right to leave their pipes there, a right of way for their pipes, and something about keeping the springs cleaned out.

Q. Who stated that?

A. Mrs. Schultz.

Q. What, if anything, was said about making of papers, if you remember anything that was said?

A. They said that they would make out the papers and send them the following Wednesday to the First National bank, the papers and the money. I think they stated afterwards that they could not give a deed on account of not having their patent.

Q. Who said that?

A. Mr. Schultz, I think.

Q. Were you in the room during the whole time they were there?

A. No, sir.

Q. How much were you out?

A. Why, I don't know exactly how much I was out; I wasn't there during the middle of the conversation; I believe I left the room.

Q. How long were you out that time?

A. I might have been out twenty minutes—ten or twenty minutes.

Q. After you came back how long was it before they left?

A. I can't say how long it was.

Q. It was about the middle of the conversation that you were out?

154 A. Yes, sir.

Q. What, if anything, was said during the time you were present about Mr. Ganahl or Hagan, or either of them, signing a written stipulation or agreement and filing it in court?

A. Nothing.

Cross-examination by Mr. MITCHELL:

Q. What time did they arrive there?

A. After nine o'clock.

Q. After nine?

A. Yes, sir.

Q. How much after nine?

A. I can't say; probably half past nine.

Q. What time did they go away?

A. Between ten and eleven.

Q. They were gathered around the table, were they, while we were talking?

A. Towards the latter part of the conversation.

Q. You were not around the table, were you?

A. No, sir.

Q. How did you know my name?

A. I think that I was introduced to you that night.

Q. You remember me as the same individual?

A. Yes, sir.

Q. You think you distinctly heard something said about not having a patent?

155 A. Yes, sir.

Q. Didn't Mr. Schultz say he would give a certificate?

A. I don't remember what he said he would give. He said he would give what they gave all parties.

Q. Where they purchased land?

A. Yes, sir.

Q. You don't remember whether I said that would be a certificate or what?

A. No, sir.

Q. You heard everything that was said while you were in the room?

A. Yes, sir; I think I did.

Q. Every word?

A. Yes, sir.

Q. What were you doing all this time?

A. I suppose I was listening.

Q. What was your bed-time?

A. Same as my sister's.

Q Half past eight?

A. Yes, sir.

Q. There was a smaller portion of the family there, was there not?

A. No, sir; I don't think so unless my little brother was in there asleep.

Q. You remember all about the sending the papers to the First National bank?

A. Yes, sir.

Q. There was considerable good-natured conversation going
156 on there, wasn't there?

A. Yes, sir; the forepart of the evening.

Q. And everybody seemed to be pretty well pleased towards the last of the conversation, didn't they?

A. I don't know. They all shook hands.

Q. How did they happen to shake hands?

A. Mr. Schultz proposed it.

Q. What did he say was the object of it?

A. To consider the compromise accepted.

Q. Mr. Schultz said those lots for the church were to be considered as his own contribution to the church?

A. Yes; that they would be made out in my father's name.

Q. And Mr. Schultz would buy them and pay for them himself and give them to the church?

A. Yes, sir.

Q. Did you hear any conversation between Mr. Hagan and myself?

A. No, sir; not unless it was towards the last around the table.

Q. Well, what did we say?

A. I don't remember anything that you said.

Q. I did considerable of the talking there, didn't I?

A. No, sir; not much that I remember of.

Q. Didn't I have something to say?

A. Toward the last you said something, but not very much that I remember of.

Q. What was it about?

A. I don't remember what it was about.

Q. Mr. Schultz didn't call me off to one side and speak to me, did he?

157 A. Not that I know of.

Q. There was no conversation indulged in but what was loud enough for you to hear?

A. No, sir.

Q. There was no side talk by Mr. Cowley and Judge Hagan?

A. No, sir; not that I remember.

Q. Well, you would certainly have remembered that if that had occurred, would you not?

A. I suppose I would; if there was anything said everybody in the room could hear it.

Q. Who did the principal part of the talking?

A. My father, Mr. Hagan, and Mr. Schultz.

Q. Wasn't the principal talking done by Mr. Schultz and your father and mother?

A. It might have been.

Q. The fact of the business is Judge Hagan didn't have much to say more than myself?

A. I think he had more to say than you did.

Q. Hear anything said about who should pay the costs of the case?

A. Yes, sir; the railroad company was to pay the costs.

Q. Hear what was said about the case being disposed of?

A. I didn't hear anything said about it that I know of.

Witness excused.

158 AGNES COWLEY, called for the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. BLAKE:

Q. How old are you, Agnes?

A. Fifteen.

Q. You are a daughter of H. T. Cowley?

A. Yes, sir.

Q. Were you present on the occasion spoken of by these other witnesses when Mr. Schultz, Mr. Mitchell, and Mr. Hagan, and your father came home?

A. Yes, sir.

Q. Were you present within hearing distance of that conversation?

A. Yes, sir.

Q. About how long do you think they were there?

A. About an hour, I think.

Q. You were not looking for them, were you?

A. No, sir.

Q. They all came in together about the same time into the house?

A. Yes, sir.

Q. Who talked first?

A. I think papa spoke first when they came in the door.

Q. What do you think he said?

A. I think he said something about their coming up and talking the matter over, so as to be sure it was perfectly understood.

Q. And what else was said by any of them after that?

A. Well, they talked about some other matters, and then
159 Mr. Schultz said something about the agreement again, and then toward the last part he said something about when they should be sent to mamma and papa.

Q. What did he say about the compromise—what it was to be?

A. Seven and a half acres of land and $8,000.

Q. What was said about the papers and money, if anything?

A. That they should be sent to the First National bank and be there Wednesday of the following week.

Q. Did you hear anything said about the costs of the case?

A. No, sir; I don't remember of hearing anything.

Q. Hear anything said about the disposition of the case in court—what should be done with it?

A. Nothing was said to that effect.

Q. What, if anything, was said about Mr. Ganahl or Hagan or either of them making a written stipulation or agreement and filing it in court?

A. Nothing was said there.

Cross-examination by Mr. MITCHELL:

Q. Who did your father speak to when coming in at the door?

A. I don't remember. I think mamma went to the door when he came.

Q. You say he said they came up to talk the matter over and see if it was thoroughly understood?

A. I think so.

Q. Who did he say that to?

A. Mamma.

Q. Then who began the talking?

160 A. They all began to talk.

Q. Did they all begin at once?

A. No, sir; I guess Mr. Schultz began to talk first after they introduced us children to them.

Q. What did he say?

A. He stated what the compromise was, and then they talked about that awhile, and then he asked if they would have the right to let their water pipes go through the lands as they had before.

Q. What was said about that?

A. They were allowed to do that.

Q. That was agreed upon?

A. Yes, sir.

Q. After everything was finally agreed upon what was done?

A. They shook hands upon it.

Q. How did that hand-shaking business happen to come about?

A. Mr. Schultz proposed it.

Q. Did he state why—for what purpose?

A. Why, they just shook hands on the agreement, so they considered it a bargain.

Q. This money and papers was to be sent so as to arrive on the following Wednesday?

A. I think so.

Q. So that it would be in the bank on that day?

A. I think so; yes, sir.

Q. Something might have been said about the disposition of the case in court and you not remember?

A. I don't remember.

Q. It might have been said?

161 A. I don't know; I didn't hear anything to that effect.

Q. You didn't hear anything about the costs, did you?

A. No, sir.

Q. And who was to pay it?

A. I don't remember; I might have heard it.

Q. It might have been spoken of also?

A. Yes, sir.

Q. This proposition as stated by Mr. Schultz was quite freely discussed, wasn't it?

A. Yes, sir.

Q. There was no objection made to it by any one?

A. I think not.

Q. What was your bed-time?

A. The same as the rest of them.

Q. Half past eight?

A. Yes, sir.

Q. How did you come to be sitting up that late that night?

A. We were talking it over with mamma and papa hadn't got home yet.

Q. Talking what over with mamma?

A. The compromise.

Q. And you were kind of waiting for your father, were you?

A. I don't remember whether we were or not.

Q. Was he usually down-town that late?

A. Why, no; not generally.

Q. Your mother had been down-town all the afternoon, hadn't she?

A. Yes, sir.

Q. What time did she come home?

162 A. I don't remember now; it was about six or seven o'clock, I think, but I am not positive when it was; five or six.

Q. Your father did not come up that evening at all until he came up at night?

A. No, sir.

Witness excused.

163 Mrs. H. T. COWLEY, called for the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. BLAKE:

Q. Your name is Lucy A. Cowley, I believe?

A. Yes, sir.

Q. You are the wife of H. T. Cowley?

A. Yes, sir.

Q. Were you present at the time when your husband, Mr. Mitchell, Mr. Schultz, and Mr. Hagan came to your house last May?

A. Yes, sir.

Q. It was after night, was it?

A. Yes, sir.

Q. Were you expecting strangers then?

A. No, sir.

Q. Now you may go ahead and tell what you remember that was said, beginning with the first thing that they said after they came in the room.

A. Well, after the introduction, as I remember, Mr. Schultz said, "We have come up to see if we understand it thoroughly," and he made the proposition that we should accept $8,000 in money and

seven and a half acres of land, and that I should have the amount of ground I asked for for the use of a parsonage. We were to take this rather *rather* than to go on with the lawsuit.

Q. I am asking you what was said in that conversation. He made that particular proposition, did he?

A. Yes, sir.

Q. What did he say about the lots?

164 A. He said they should be wherever I chose to select them outside of a 100-foot limit and where the railroad should put on their own individual rails.

Q. What did he say about who should pay for that?

A. He said he would give $10 apiece for them and deed them to the church or me or any one I might mention.

Q. Those lots were a part of this disputed ground, were they?

A. Yes, sir.

Q. What was said about the payment of the costs of the case?

A. Mr. Cowley asked who should pay it, and Mr. Schultz said the company, of course, as they had been the instigators of it.

Q. What was said, if anything, about the making out of papers that night or day, if anything was said on that subject?

A. When he was stating what we should have as a compromise he stated that he didn't wish to put it in writing, but he wished us to take his word for it, and it should be completed the coming Wednesday.

Q. What was said about the making out of the papers and sending the money, if anything?

A. Mr. Schultz said he would have to go down to headquarters to make them out, and I understood him to say they were to be sent to my husband—the papers and money.

Q. Had you seen either Mr. Mitchell or Mr. Schultz before that day?

A. I hadn't seen them before that afternoon.

Q. Had you seen them that day before they came to your house?

A. No, sir.

Q. Had you ever met either of them before?

165 A. I had met Mr. Schulze before.

Q. How long before?

A. I can't say. It seems to me it might have been two years, and it may not have been so long. I met him once in Mr. Newbery's land office on business matters with Mr. Strobach with him.

Q. Had you been down-town the afternoon of May 10th last?

A. Yes, sir.

Q. When were you first notified of this proposition of compromise?

A. In Mr. Ganahl and Hagan's office.

Q. When was that?

A. The 10th day of May.

Q. In the afternoon?

A. Yes, sir; about half past one; somewhere about that time.

Q. Who notified you about it?

A. Mr. Hagan.

Q. Who was present?

A. Mr. Ganahl, Mr. Cowley, Mr. Havermale, Mr. Newton, and Mr. Maxum.

Q. And what did he say the proposition was?

A. To receive $8,000 in money and thirty lots at $500 apiece, or a lawsuit.

Q. Now, go ahead and explained more fully what it was that he said.

A. He said that he had agreed to go into the law with us, and he would keep his agreement; that something had come to light that made him satisfied that he would be beaten in the lawsuit and advised us to take this compromise. He said that Mr. Cowley
166 had acted as agent for the Indian was the same as acting for himself, and I stated to him that while that action covered two forties there was still a forty that wasn't in it, and he stated the action in regard to two forties covered the three. Further than that there was nothing said that I remember. I went out very soon with my husband; went out to talk over what was wise or must be done. I had asked that the testimony of our witnesses be taken, and Mr. Hagan refused it. I was down as a witness, so were these three gentlemen I have mentioned, expecting to give our testimony on the lawsuit.

Q. Was that about all the conversation you had with him that afternoon concerning the matter?

A. He stated that he had thought for awhile that Mr. Cowley's case was not good; that Mr. Ganahl still held to it being good, and Mr. Ganahl stated that something had come to his light that morning that was like pouring cold water down his back, and that he now agreed with Mr. Hagan that the case was not as good as he thought in the law.

Defendant, by counsel, objected to the above questions and answers regarding the conversation between the plaintiffs and their former counsel, Hagan and Ganahl, for the reason it was immaterial, irrelevant, and incompetent; which objection was overruled by the referee; to which ruling of the referee defendant, by counsel, then and there excepted.

Cross-examination by Mr. MITCHELL:

Q. You had been down-town that afternoon, had you not, Mrs. Cowley?

A. Yes, sir.

Q. You had had this matter under consideration all the afternoon?

167 A. Yes, sir.

Q. Went down about one o'clock?

A. Half past, I should judge.

Q. Now, the time set for the taking of testimony was ten o'clock in the morning?

A. Yes, sir; and I was dressed and waiting for the hack to come for me.

Q. How did it happen that you were not down there in the morning?

A. Mr. Cowley said he would send a hack and I was not very well, and they didn't want to take any more of my time than possible.

Q. What time did your husband come up to get you?

A. It was probably that time. I took a hack immediately and came down, and was already to come.

Q. He told you there was a proposition of compromise?

A. He told me he didn't know what was to be done; there might be something of the kind.

Q. You say you didn't meet Mr. Schultz that afternoon at all?

A. No, sir.

Q. Did you meet me that afternoon?

A. If I did I didn't know it. I may possibly have passed you on the street.

Q. You say when Mr. Schultz arrived he said he came up to see if you understood each other?

A. Yes, sir.

Q. In relation to the proposition that had been made?

A. Yes, sir.

Q. Now, it was arranged that he should send all the papers and the money so as to arrive on the following Wednesday?

168 A. That was the way I understood it.

Q. They were to be sent to the bank?

A. I didn't understand it that way. I don't remember that the bank was mentioned at our house.

Q. Were they not to be sent to Mr. Glover, of the bank?

A. His name was not mentioned at our house that I remember.

Q. It might have been?

A. I don't think it probable, for I think the name would have made an impression on me.

Q. That might have been the arrangement?

A. I don't think his name was mentioned at our house at all.

Q. You heard the testimony of your husband on that point?

A. I don't remember of hearing his name mentioned in the house at all.

Q. Mr. Schultz was going home that night?

A. I think so.

Q. I was also to leave that night?

A. I don't remember about your leaving.

Q. These papers were to be drawn up by me in Tacoma and sent?

A. I understood Mr. Schultz was to do it; that was not particular to me if they suited me when they got here; I expected to see them.

Q. You had agreed fully how they should be?

A. No, not how; that was not asked at our house.

Q. Mr. Schultz told you what he would give you; a certificate?

A. I don't remember. I remember he promised we should receive the papers and money on Wednesday.

Q. Anything said about not being able to give a deed, for
169 we didn't have a patent?

A. I don't remember, for I know warranty deeds have been given on that land.

Q. Did he say anything about giving the same kind of certificate he gave to others?

A. I don't remember. I expected to see the papers and be satisfied they were all right on Wednesday.

Q. Some directions were given to me by Mr. Schultz, were they not?

A. I don't remember that there was.

Q. Your memory is very clear about the proposition that was made?

A. Yes, sir.

Q. And the terms of it?

A. Yes, sir. I don't remember that you talked at all until we began to talk socially.

Q. You don't remember about my saying that I was going home and would be back on the first day of the term of court and Judge Hagan and I could then fix up the papers so far as the court was concerned?

A. You didn't say anything of the kind at our house.

Q. Nothing of the kind?

A. No, sir.

Q. Nothing said about the payment of the costs?

A. Yes, sir; Mr. Cowley asked who should pay, and Mr. Hagan said he thought Mr. Cowley, and Mr. Schultz said, "No; we pay costs."

Q. That the railroad company pay the costs?

A. Yes, sir. Mr. Hagan put it in the way of a question, and I think he probably looked at Mr. Schultz, though I am not sure of that.

170 Q. Well, how did the matter finally end there?

A. It ended with the understanding that if it was as we understood it on Wednesday it was a bargain, and we shook hands on it?

Q. Shook hands on it?

A. Yes, sir.

Q. Did you or your husband ever look at the papers to see if they explained it when they arrived?

A. I know nothing more about it. I have never seen Mr. Glover or Mr. Hagan or any of the parties since.

Q. Whose proposition was it to shake hands?

A. He, Shultz—he said, "Now, I think we understand each other and we will shake hands," as I remember it.

Q. And you proceeded to do so?

A. Yes, sir. I considered that we were American citizens and were to look over our own papers and be satisfied that they were all right, the same as if we bought a piece of property.

Q. You were in possession of this seven acres and a half at the time?

A. Yes, sir.

Q. And remained in possession ever since?

A. I suppose so. There are no houses on there, that is all I know, besides our own.

Q. Never have been disturbed in possession by anybody?

A. Not that I know of.

Q. Wasn't it mentioned that there should be reserved a right of way across this seven and a half acres for our water pipes?

A. Yes, sir; it was mentioned that the water pipes should be as they were.

171 Q. That was spoken of and reserved from the seven acres and a half?

A. Yes, sir; I suppose it was to be that way.

Q. And the seven and a half acres were pretty definitely understood as to what that was to contain; the outlines and boundaries?

A. Yes, sir; from Sixth to Eighth street and — street west, and no streets to be run through it. It was to be as a piece without being platted. The street west I don't know the name, or if it has been dedicated to the public.

Q. These church lots; Mr. Schultz said you were to consider those as a free contribution of his to the church?

A. I didn't understand it so.

Q. Didn't he say so?

A. No; he said, "You can have them; I will buy them and give $10 apiece for them, and will deed them to the church or to you or to any one you mention."

Q. He said he would deed them to the church or to you or anybody you would mention?

A. Yes, sir.

Q. He would buy them from the company?

A. Yes, sir; that he would give $10 apiece for them, and I might select them anywhere I might choose so it was not on the 100-feet limit or where there were improvements belonging to the company.

Q. It was indicated also how this seven and a half acres should be received so as to give you your improvements?

A. Yes, sir; as I say, from Sixth to Eighth street, and a street west outside of the improvements on section 20.

Q. So as to include your orchard and *and* barns and house?

172 A. All our improvements; we have improvements on the other forty which was our first home; it was on the Swift forty.

Q. That was all understood?

A. He also spoke about the pasture and he said we should have the use of it for ninety days.

Q. Until such time as he would want to plat the land?

A. I don't think he mentioned platting.

Q. He did say he was going to plat the land?

A. I think he did; those things were of no importance to me and I don't positively remember.

Q. Now, who asked him to put it in writing?

A. I think that up at our house he asked this question, "To whom shall these papers be made and this money sent?" and I said, Mr. Cowley; he had always intended to give me that piece of ground, and that is the reason I made the answer.

Q. Who made the suggestion that this matter be reduced to writing?

A. I think there was no suggestion made; I have already stated that when he told me what the proposition was and spoke about it in detail he said, "I don't wish to put it in writing; take my word for it and I will complete it Wednesday."

Q. No one suggested that it be put in writing?

A. I think not; he put it altogether at once.

Q. There was no one there suggested that it be put in writing?

A. I think not; not that evening.

Q. And the agreement was made without any agreement being made to put it in writing except the one of sending the papers on Wednesday.

173 A. As I understood it, we were to hold open until we should see the papers and accept them, if we were satisfied with them; I don't consider we were bound until we signed the papers.

Q. Did you ever make any effort to see the papers?

A. No, sir; I am only second in the matter.

Q. You were first then, were you not?

A. Certainly, he came up to see if I understood it, me and my husband.

Q. He found it was necessary to see you?

A. Yes, sir; I believe so, for nothing is good without the wife's name.

Q. He had probably got your husband's agreement before he came up there?

A. I don't know; I hadn't seen him since I left town, since he had seen the lawyers the last time.

Q. The case was adjourned over until the next day to give you an opportunity to consider the matter from two o'clock?

A. No, sir; we had until, I think, only five.

Q. The matter wasn't fully agreed upon until about 11?

A. I should think he was there about that hour, although I didn't go to look at the time. Judging from the circumstances, I should think about that hour.

Q. The shaking of hands was certainly an amiable sort of arrangement?

A. Certainly, it was pleasant; I didn't object.

Q. All seemed to be pleased over it?

A. I can't say as I felt good over it; I didn't think it was as big an offer as the railroad company would make, but didn't think we could help ourselves.

174 Q. There were expressions there that they were glad it was over?

A. I am always glad.

Q. Wasn't it said there?

A. I don't remember.

Q. It may have been your husband or somebody?

A. It may have been; I don't remember.

Q. You had been considering the matter then from about two o'clock?

A. Well, I would judge it might have been that time; Mr. Hagan first stated we could have just a half hour to decide, and I refused that, and afterwards he said that we should have until the next day, and Mr. Shultz said he was in haste and said he wished we would decide it now; that was what Mr. Hagan told me.

Q. Negotiations for settlement had been going on between your husband and the company for some time?

A. Yes, sir.

Q. For some years?

A. Yes, sir.

Q. And there had been various propositions back and forth?

A. Yes, sir.

Q. You had before this, May 10th, talked with your attorneys about the matter of settlement and compromise?

A. I never talked with the attorneys only in the presence of Mr. Ritz when these three offers were given to his keeping. He stated he was going East on business.

Q. The matter was generally discussed frequently with your attorneys—the matter of compromise?

A. Not in my presence.

Q. The matter with Mr. Ritz was?

175 A. The matter was in print, and you can read it.

Q. It was talked over with the attorneys?

A. No, sir; only consented to. It was agreed Mr. Ritz should have a power of attorney for thirty days.

Q. That certainly had to be discussed to agree to it?

A. No; it was not discussed.

Q. Your attorneys had been favorable to a settlement and compromise of the case before *them*?

A. Not that I know of.

Q. You let your husband do most of the business?

A. I had nothing to do with it all; never had any acquaintance with his attorneys.

Q. You don't know what arrangement he made with them for settlement or compromise?

A. Never had anything to do except what was printed in regard to Mr. Ritz.

Q. That was only done with Mr. Ritz because he was going on East and would meet some of the principal officials of the company while there?

A. He thought he could compromise the matter and wished the privilege of doing so, and Mr. Cowley and myself made out the papers of authority given to Mr. Ritz to do that if it was possible.

Q. It was merely given to him because he was going there and would be on the ground?

A. I can't say. He was fully authorized to do what he could,

and it was all in print—what authority was given him—the stipulations are in print.

Q. He represented he had considerable influence with the
176 officials of the company?

A. Yes, sir.

Q. Who stated the proposition in Mr. Ganahl's office?

A. I think Mr. Cowley and I made the terms on which we would compromise, and they were printed.

Q. On this 10th day of May who stated that?

A. Mr. Hagan, if I remember rightly; I am confident it was Mr. Hagan.

Q. Now, these thirty lots were included in the proposition, as he stated; they were a part of the seven acres and a half, were they not?

A. Yes, sir; and he stated their price was $500 a lot.

Q. At that time the seven and a half acres had not been platted?

A. It is not platted now.

Q. Those are lots that were made in platting?

A. They might be made.

Q. Inside of the boundaries there were seven acres and a half?

A. Yes, sir.

Q. Do you know what was the object of giving that particular tract of land?

A. I suppose because the main part of our improvements are on it; that was the part we were most desirous of having.

Q. There was not to be deducted from this $8,000, the value of this seven acres and a half of land, any price to be paid by you for the land?

A. No, sir.

Q. Nothing was mentioned about that?

A. No, sir.

177 Q. This was merely for the sake of a compromise and ending of the controversy?

A. We either had to take it or have a lawsuit, as I stated.

Redirect examination by Mr. BLAKE:

Q. Those seven acres and a half that were spoken of there that night, you may state whether it had been surveyed or not—fixed boundaries made at that time?

A. Yes; it had been surveyed, but, as I said, it had never been platted.

Q. I am speaking now of those seven and a half acres.

A. No; it had not been surveyed in that term.

Q. In that shape?

A. No, sir.

Q. If anything was said there that night as to how the description of that seven acres was to be made you may state what it was.

A. It was stated it would be from what might be Sixth street to what might be Eighth street, and was to extend west to a street just outside of our present fence and east of the dividing line between sections 20 and 19. I think the railroad section was 19.

Q. Now, was there anything said about it being measured or having to be measured or anything of that kind?

A. No; I hardly think so. I don't remember anything being said about measuring it.

Q. What was said, if anything, in that conversation by Messrs. Ganahl and Hagan or either of them making or entering into a written stipulation or agreement and filing it in court?

178 Defendant, by counsel, objected to the last question for the reason it was immaterial and irrelevant; which objection was overruled by the referee, to which ruling of the referee defendant, by counsel, then and there excepted.

A. Nothing was said.

Cross-examination by Mr. MITCHELL:

Q. You knew pretty well, Mrs. Cowley, just about how these boundaries would run?

A. Yes, sir; I knew pretty well.

Q. You knew, then?

A. Yes, sir.

Q. The land adjoining it was laid off in blocks so you could tell pretty nearly?

A. Yes, sir; I could tell pretty nearly, but I wish to say, Mr. Mitchell, that I didn't consider anything was positive until we should sign the papers.

Witness excused.

179 JOHN N. GLOVER, called for the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. BLAKE:

Q. Your name is J. N. Glover?

A. Yes, sir.

Q. Mr. Glover, I will get you to tell the court, if you please, if there were certain papers sent you by the Northern Pacific Railroad Company concerning the settlement of the case of that company against Mr. Cowley some time last May, 1888?

A. Yes, sir; there was.

Q. Do you remember what day you received those papers?

A. Well, I don't remember now the exact date; still I can tell by referring back. I think it was on the 15th or 16th of May last; that is my recollection. I would not be positive now, but about that date, and I have got the papers in my possession now that were sent to me. I could tell, by referring to them, the exact date.

Q. Who sent you those papers?

A. Mr. Schultz.

Q. From where?

A. Tacoma.

Q. There was a letter or instruction accompanying the papers?

A. Yes, sir.

Q. And you say you have them now in your possession?

A. I have.

Q. What papers were sent in addition to the letter?

A. Well, I didn't examine the papers; they were sent to
180 me with instructions to hand them over to Messrs. Ganahl and Hagan, and immediately on receiving the papers I took them to one of their offices and delivered them to them. There was a quitclaim deed for one document that was sent and perhaps still other documents. I didn't examine them particularly; it was none of my concern. I simply followed out my instructions as the letter gave accompanying the documents.

Q. Was there a draft for any money?

A. Yes, sir; a draft for $8,000 came with the papers.

Q. To whom was the draft payable?

A. The draft was made payable to my order with instructions what to do with it whenever the papers were properly executed and returned to me.

Q. What did you do with that draft?

A. I have held it subject to their order, and have had it ever since that date and ready to pay over any minute.

Q. Who was the draft on?

A. The First National bank, Portland.

Q. Have you cashed that draft?

A. Yes, sir.

Q. When did you cash it?

A. Away along last summer some time; I don't remember, but not a great while after I received it. I thought if the company was willing to entrust the draft to me I would like to use the money until they called for it.

Q. That is right.

A. That is the size of it, exactly.

Q. Did or didn't you hand the draft over to Messrs. Ganahl and Hagan?

181 A. No, sir; they have never had or never seen it. I informed them and showed them the letter that was sent to me, and told them the money was ready any minute the papers were delivered and properly signed.

Q. This quitclaim deed was a deed to be signed by Mr. and Mrs. Cowley?

A. Yes, sir; the papers, whatever they consisted of, were to have been signed by Mr. and Mrs. Cowley.

Q. Do you know where that deed is?

A. I do not.

Q. Have you seen it since you delivered it to Ganahl and Hagan?

A. I have not.

Q. Which one of these gentlemen did you deliver it to?

A. Both were present. I don't remember which I handed it to, and also Mr. Cowley was present at the time I handed them the papers.

Q. Was he in the room, you say?

A. In a chair, right near by, when I delivered the papers.

Q. What did you say, if anything?

A. I just said there were the documents forwarded to me by Mr. Schultz, and showed them my letter of instructions, and they said they would attend to the matter during the day and have me pay the money over, and the matter has simply remained there in my hands ever since.

Q. Did you say anything to Mr. Cowley?

A. No, sir.

Q. Did he to you?

A. No, sir.

Q. You say you can't tell whether the conversation was between you and Hagan or Ganahl?

182 A. All of them. It was a joint conversation; they were present at the time and I knew it, and my instructions were to that end.

Q. To refresh your recollection, you didn't know really that they were partners?

A. They were in that case, but whether they had dissolved before that I can't say, but I know they were jointly interested in that matter, and my instructions were to deliver the papers to those two gentlemen.

Q. During the time you were in there did Mr. Cowley take any part in the conversation?

A. I don't remember that Mr. Cowley said anything. I wasn't in the room five minutes in all. I simply went over after the receipt of the papers and delivered them to Messrs. Ganahl and Hagan. Mr. Cowley was in the room, sitting there, and I delivered them and went out. I don't think I was in there five minutes, for my letter was short, and I went back to business.

Q. You don't think he participated in the conversation?

A. I wouldn't say he said anything. My impression was, from the conversation with Messrs. Ganahl & Hagan at the time, that the papers would be executed. In fact, they said that in substance to me; that they would be executed during the day and I would be called upon to pay the money over.

Q. You think Ganahl and Hagan said that?

A. One of them. It was generally understood by them and myself—that was, the impression that the papers would be executed that day. I think they said they would have to send up and get Mrs. Cowley—I think that was the remark they made—and have her brought down to execute the papers. I mean that was

183 the impression that was left on my mind—that they were to be completed during the day and the money would be called for. They asked me if I had the money and I told them I had, and, infact, the letter showed that.

Q. Can you tell now what other papers were in that?

A. No, sir; I can't tell exactly; I know there was a deed of some kind, and I think it was a quitclaim and possibly other papers, and just what the papers were or substance of them I can't say, for I didn't look them over; it was nothing to me.

Q. Did you see Ganahl and Hagan or either of them in regard to the matter after that?

A. No, sir; I did not.

Q. Did you see Mr. Cowley then or soon afterward in regard to the matter?

A. No, sir; not for some time, anyway; I don't remember that Mr. Cowley ever spoke to me about it except when you and he were in the office one day asking about the money.

Q. That was a short time ago?

A. Two or three or four months since.

Plaintiff offered and introduced in evidence the letter of instructions just referred to, which letter was received without objection and marked Exhibit "H" by the stenographer for identification and is hereto attached and made a part of this record.

Cross-examination by Mr. MITCHELL:

Q. To whom was this draft to be endorsed by you? Who was it to be paid to, Mr. Cowley?

A. I was to pay him the cash.

Q. Pay him the cash?

A. Yes, sir.

184 Q. How would you do that?

A. I would take the draft; it was made payable to me or my order; I can send it to Portland and have it placed to our credit—the bank's credit or my credit—and I could put it in the bank and get credit for it; I say we can, and have the $8,000 placed to my personal credit at the bank, and the bank would return it to the bank at Portland, the same as any other Portland exchange.

Q. Who was in Ganahl and Hagan's room when you went in?

A. There was no one in but Mr. Ganahl and Hagan and Mr. Cowley.

Q. Mr. Cowley was already there when you arrived?

A. Yes, sir; when I went in, and I left him there when I came out.

Q. He heard what conversation passed between you and Messrs. Ganahl and Hagan?

A. Yes, sir; he was probably as near as you at the time—right near—so as any one in the room could have heard all the conversation that passed.

Q. Did he say anything about the matter to you?

A. No, sir.

Q. You left all the papers with them?

A. Yes, sir; I left everything with Messrs. Hagan and Ganahl except this document I hold here and the draft.

Q. How is that money placed in the bank now?

A. That money is to my personal credit and is now, although I gave Mr. Schultz afterwards a document signed by the president of the bank, so that the company might know how the money was deposited there, but at the same time the money was there all the time to my personal credit, for it was sent to me personally.

Q. These papers you left with Hagan and Ganahl?

A. Yes, sir.

185 A. *Yes, sir.*

Q. Never seen them nor don't know what became of them since?

A. Of course afterwards the company naturally wanted to know where the $8,000 was and who was responsible for it, and they wanted something more than from an individual to know the money was there and in safe hands; they might know the name, but not know me.

Q. Has the company ever made any application to you to have the money turned over to it?

A. No, sir; never have.

Q. They have given you no different or other instructions than what you received?

A. None at all.

Q. Is that still there for the same purpose that it was put there for?

A. Yes, sir; in my hands, subject to be turned over any minute when the documents are brought in there properly executed.

Q. You delivered these papers and notified the parties the same day you received them?

A. Yes, sir. I see this was dated May 14th, and I suppose I would receive it May 15th; 15th or 16th is my recollection.

Redirect examination by Mr. BLAKE:

Q. You say that afterwards you gave the railroad company some sort of a written obligation about this money?

A. No; I showed them how it was in there and signed it personally as president of the bank.

Q. About when was that done, if you remember?

A. It was about six or eight months since; it was after I
186 held the money; I think it was during this last winter; I would not be positive the length of time.

Witness excused.

187 E. A. ROUTHE, called for the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. BLAKE:

Q. Do you know Mr. Cowley, Mr. Routhe?

A. Yes.

Q. How long have you known him?

A. About three years.

Q. Known him ever since you have resided in this city?

A. Yes.

Q. I will ask you if some time last May you went with Mr. Cowley to the office of Mr. Hagan, the attorney, in this city.

A. Yes.

Q. You know Mr. Hagan, do you?

A. Yes.

Q. You may state whether he was at any time acting as attorney for Mr. Cowley in the railroad case.

A. As far as my knowledge goes, I can't say; but I suppose he was, from the fact that he had had charge of the case.

Q. You may state how you came to go to his office.

A. Mr. Cowley requested me to go with him—met me on the street, in front of the Hyde block, and wanted to know if I wouldn't go with him upstairs to Mr. Hagan's office, as he wanted to have a little talk with Mr. Hagan and would like to have me hear the conversation, and I went with him.

Q. When was this?

188 A. About a year ago somewhere; I can't tell exactly; it was in the latter part of May or first of June; I can't tell when; I think the latter part of May. My memory isn't good on dates.

Q. Do you remember the circumstances of the proposed settlement of the case?

A. Yes; I remember something about it.

Q. When was it with reference to that?

A. It was after some sort of an endeavor had been made to settle the case, but just how near—several days afterwards; how long I don't remember; some time afterward.

Q. Do you remember afterwards of hearing of a judgment being entered in court?

A. Yes, sir.

Q. When was it with reference to that?

A. I can't remember now whether it was previous or subsequent; the fact of the business is I didn't give the matter very much attentian, as it was one of the many circumstances that were transpiring at the time, and I gave it no personal concern.

Q. Did you ever go to Mr. Hagan's office with Mr. Cowley at any other time?

A. That is all I remember of; going there just once.

Q. Now, you may tell what was said in that conversation between Mr. Hagan and Mr. Cowley.

Defendant, by counsel, objected to the last question as immaterial; which objection was overruled by the referee; to which ruling of the referee defendant, by counsel, then and there excepted.

A. I don't remember literally what was said; substantially Mr. Cowley stated to Mr. Hagan that he had employed other attorneys; that he wasn't satisfied with the manner in which the case

189 had been conducted or handled, and Mr. Hagan said he expected to go ahead, he and Mr. Ganahl, and prosecute the case themselves, and whatever Mr. Cowley wanted to know they would assist, and he said they would not play second fiddle to anybody; I believe that is the word—or act as tail to anybody's kite; that they had done what they thought best, and at the same time they proposed to go ahead and prosecute the case themselves. I just can't remember what Mr. Cowley said, but it occurs to me that he dissented, rather, but in a very kindly way, to what Mr. Hagan said, and asked where Mr. Ganahl was, and he told him he was in his office, in the adjoining room, and we left there and I started out, and

he wanted me to go with him to Mr. Ganahl's office, and I went in there with him.

Cross-examination by Mr. MITCHELL:

Mr. MITCHELL: I have no questions to ask, and move to strike out all the testimony of the witness for the reason it is immaterial and incompetent.

The referee overruled the objection; to which ruling of the referee defendant, by counsel, then and there excepted.

Redirect examination by Mr. BLAKE:

Mr. BLAKE: I want to introduce the complaint in the original action and the answer and the reply.

Mr. MITCHELL: I don't object to the referee using the records in the original case and referring to them, but object to them encumbering this record.

Mr. BLAKE: I desire now to read in evidence the written stipulation signed by James McNaught and J. H. Mitchell, Jr.,
190 attorneys for the railroad company, and Messrs. Ganahl and Hagan, attorneys for Mr. Cowley, filed in the case of The Northern Pacific Railroad Company *vs.* H. T. Cowley, in the district court, May 21st, 1888.

Mr. MITCHELL: I have no objection.

Mr. BLAKE: I also desire to read in evidence the decree of the court entered upon said stipulation and satisfaction that was entered upon the same day in said court.

Mr. MITCHELL: I have no objection to those last documents.

Witness excused.

191 H. T. COWLEY, recalled for cross-examination, testified as follows:

Cross-examinatton by Mr. MITCHELL:

Q. Mr. Cowley, the lands immediately joining this seven and one-half acres in this disputed tract were frequently spoken of as blocks, were they not?

Q. Which part do you refer to?

Q. Immediately surrounding the seven and a half acres.

A. My home.

Q. Well, they were generally designated as blocks?

A. Well, I have never recognized any blocks.

Q. There was no map or plat filed, but there had been some location made?

A. So far as I notice the map of the city there is a vacant space coming up as far as Third street from Washington street and just two blocks east, and there is a vacant space along the line. It has not been laid off or platted.

Q. They have been designated at times between you and Mr. Schultz as blocks?

A. No, sir; Mr. Schultz spoke to me about it as acres and said he would have it surveyed.

Q. Are there any blocks immediately surrounding these seven acres and a half, some of which are included in the seven acres and a half; they are not regular blocks and not laid off in lots?

A. There is an irregular strip at the upper end of the south forty. Mr. Glover purchased ten acres; that has always been re-

192 garded as blocks, and at the foot of the bluff there are a number of long lots to Howard street, and the south of it is laid off on the map as Fifth avenue; a part of that surveyed on this claim is an undivided portion at the upper end, but there are some blocks put down, such as 90, 91, 100, &c.

Q. These were given as blocks at that time, at the time of this adjustment you had at the house?

A. In reference to it?

Q. They were given as blocks?

A. I suppose so.

Q. You knew at that time blocks 90, 99, 100?

A. I knew them on the map.

Q. Where is block 99 and 90 with reference to this tract?

A. I never traced them up.

Q. About where are they?

A. Up on the hill.

Q. You know where they are on the map?

A. Yes, I could run them out.

Q. How often did you go with Major Routhe to Hagan's office?

A. Only once.

Q. Have you got in your possession the power of attorney that was given to Mr. Ritz?

A. Not home.

Q. Have you it in your possession?

A. I think he didn't return it to us; no; he didn't return it; it was limited to thirty days.

Q. I didn't know distinctly the propositions that he was to submit.

193 A. There were three propositions. One I don't recall very clearly, but it contemplated something like an equal division in the property.

Q. You say one contemplated an even division of the property?

Plaintiff, by counsel, objected to the last question for the reason it was irrelevant; which objection was overruled by the referee; to which ruling of the referee plaintiff, by counsel, then and there excepted.

A. Something like that.

Q. Well, what were the others?

A. I stated two of them yesterday. I can't quite recall the third. I believe I have a copy of the proposition. I mentioned two yesterday. One was to give or take $45,000 for the whole thing. If we were to buy we would pay $45,000, and if the railroad company would buy they were to pay us $45,000 and reserve to us a strip

of land equal to fifteen acres. The other one was a division of the property on a line north and south in half, and I give them a quitclaim deed to the west half and they give me a quitclaim deed to the east half. The other one I cannot recall. It was somewhat similar.

Q. The other one that you cannot recall is one that he was to submit in case he could not get either of the other two through?

A. There were three propositions. One was to be submitted, and if it was rejected he was authorized to offer another.

Q. Which was he authorized to offer first?

A. My impression was to give $2.60 an acre for the land first. That is my impression about it.

Q. Did not Messers. Ganahl and Hagan on the 16th read to you descriptions of a certificate or deed?

194 A. No, sir. I intimated to them that I didn't wish to hear them.

Q. They proposed reading them to you?

A. I can't recollect about that. I can't recall the proposition. He offered it to me to read myself and I rejected it.

Q. After you had rejected it did you tell them you would take until afternoon to consider it?

A. Yes, sir. I said that I would not look at it then and would take until afternoon to decide to accept it or reject it.

Q. How did you know what you would accept or reject if you didn't look at the papers?

A. The matter was simply here—that I had descovered that my attorneys had played me false and I didn't want to have anything to do with it. I discovered they had led me into consideration on a proposition of compromise that was unfair, and I was revolving in my mind what I could do under the circumstances.

Q. Did you think it was unfair at the time it was talked over up here at the house?

A. I myself decidedly thought it was not the compromise it should be, but merely stopped in order to get the cloud off the land. My view has always been that a compromise is an exchange of half the consideration of the issue between the parties. I always stood ready to yield the half.

Q. Did you on the following day consider it unfair?

A. I have always considered it unfair certainly.

Q. Did you tell Mr. Schultz at the house here that you considered it unfair?

A. No, sir; I never discussed the value of the proposition with Mr. Schultz; that proposition. I discussed the matter be-

195 fore, when I made a proposition through him to Mr. Lamborn to settle it up, accepting half. Mr. Schultz knew what my sentiments were, and Ganahl and Hagan knew what my sentiments were.

Q. You talked over with Mr. Schultz, didn't you, on the 10th of May, about what money value the seven acres and a half would stand you?

A. Mr. Schultz made the statement himself. I asked him to

make the statement and he said he considered the seven acres and a half worth something like $1,000 an acre.

Q. Did you tell him you didn't think so?

A. I didn't express my view on that point.

Q. You didn't tell him what you thought it was worth?

A. No, sir; I may have conceived after he asked me, but I can't say that he asked me.

Q. Confer in what he said?

A. Yes, sir.

Redirect examination by Mr. BLAKE:

Q. Mr. Mitchell asked you on yesterday if you did know that Ganahl and Hagan were acting for you on the first day of court. What do you say about that?

A. I think I corrected that. I didn't expect them to act for me, for they were discharged from my service. I expected they would make an effort to get the case in court on Monday.

Q. Did you know that they would carry through and undertake to file any sort of a stipulation settling the case on that day?

A. Certainly not.

196 Cross-examination by Mr. MITCHELL:

Q. You say, Mr. Cowley, you didn't expect them to act for you. Did you not know they were acting for you as your attorneys?

A. No, sir; how could I know when I had sent them a notice of discharge?

Witness excused.

197 *Defendant's Case.*

Defendant, by counsel, here moved the referee for a nonsuit in this case on the ground that the plaintiff had not made out a case, as shown by the evidence; which motion was overruled by the referee; to which ruling of the referee defendant, by counsel, then and there excepted.

GEORGE TURNER, called for the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. MITCHELL:

Q. You reside in this city?

A. I do.

Q. You reside here during the month of May, 1888?

A. Yes; I was a resident of this city at that time.

Q. State if you had any conversation with Mr. Cowley, the plaintiff in this case, during the month of May, 1888, concerning a settlement of the case, which was then pending between him and the Northern Pacific Railroad Company in the district court in this city.

A. I had a conversation with him concerning that case, but could

not say it was in the month of May. It was at the time I understood that Mr. Cowley had compromised the case with the Northern Pacific Railroad Company and when the attorney of the company and Mr. Schultz were here. I heard of it in that way. I met Mr. Cowley on the street and had some conversation with him about it.

Q. Was that after Mr. Schultz and myself were here?

A. My present recollection is, it was while you were here.

198 I would not be positive about that.

Q. That action that you were then speaking about with Mr. Cowley was the suit in relation to the land now in this action?

A. Yes; the land that has been known in controversy between Mr. Cowley and the railroad.

Q. What was said by Mr. Cowley in that conversation about the matter of settlement?

A. I merely met him and we walked up the street together, and I mentioned I had heard that he had got some kind of a settlement with the company, and he told me he had and gave me some of the details of the settlement.

Q. Did he say in a general way what the settlement was?

A. I think he said that in the settlement he had been allowed a quantity of land, some ten or fifteen acres—I can't be certain as to the quantity; somewhere along there—and should be paid $6,000 or $8,000 in money; I am not certain which; I did not charge my mind with it. I told him the tract of land would be very valuable and on the whole thing to make the compromise. I was always in favor of it and I think he agreed with me. I think he said it was not all he was entitled to, but it would stop the litigation.

Cross-examination by Mr. BLAKE:

Q. This conversation, Judge, was while Mr. Mitchell and Mr. Schultz were yet in town, you think?

A. I would not say so, but that is my present impression.

Q. It was before the term of court began, was it not?

A. It was before the argument had in court about setting

199 aside the judgment and before, of course, any judgment had been rendered in that case, but whether it was before the term of court I can't say.

Q. What do you think he told you about the terms of the compromise?

A. He told me he had got a sum of money—my present recollection is it is somewhere in the neighborhood of $6,000 or $8,000—and a quantity of land in addition, some ten or fifteen acres; I can't say what quantity now.

Q. Do you remember whether he said the matter had been closed up and whether he had actually received any money or whether he was to receive the sum of money named?

A. I don't remember that; my present recollection is that it was while these gentlemen were here, and I got the idea that probably he had not received the money, but that the agreement had been

entered into for a sum of money, but don't remember whether anything was said as to whether the money had been paid or not.

Witness excused.

200 J. M. ADAMS, called for the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. MITCHELL:

Q. You are a resident of this city?

A. Yes, sir.

Q. You were a resident of this city during last May, 1888, a year ago?

A. Yes, sir.

Q. You know the plaintiff, Mr. Cowley, in this case?

A. Yes, sir.

Q. State whether you had any conversation with Mr. Cowley during the month of May, 1888, relative to a settlement of his controversy with the Northern Pacific Railroad Company concerning the tract of land in the city here and case then pending in the district court in this city.

A. Yes; I had some conversation with him in regard to the matter.

Q. State when that was with relation to the time, if you remember, when Mr. Schultz and myself were here in the city during that month, if you remember.

A. Well, it was the time Mr. Schultz was here; at least, I suppose he was here. He was here the day before this conversation took place. I will state how it happened that we had the conversation, as far as I remember it. Judge Ganahl and Mr. Cowley had conversed with me once or twice, several times, I believe, in regard to the case and had procured from me several decisions and documents of various kinds they desired to use, and one morning Mr. Cowley informed me the matter had been settled, that the
201 dispute between him and the company had been adjusted, and that day, I think it was the same day, I met Mr. Cowley on the street near the Hyde block, and something further was said about it, and he made the statement to me it had been settled. Afterwards, I think it was, I don't know how long afterwards, he was at the counter of the land office, and I think accompanied by Mr. Blake, and asked some further questions as to the status of the land as shown by the land office record.

Q. You were register of the land office at that time?

A. Yes, sir; and at that time the statement was made to me by Mr. Cowley or Mr. Blake, one, that Mrs. Cowley was dissatisfied with the adjustment that had been made, and I gathered from what they said that the matter had been reopened.

Q. Well, now, on the day he had the conversation with you, subsequent to the time Mr. Schultz and myself were here, did he say anything about the nature of the settlement, or how he was pleased with it, or anything of that kind?

A. My recollection is that he spoke as though it was satisfactory and the adjustment was for the best. I can't remember exactly how he expressed that, but that was my impression, and I know I felt glad that the matter was settled satisfactorily to Mr. Cowley and all parties, as I had heard a good deal about the case.

Cross-examination by Mr. BLAKE:

Q. The first conversation you spoke of, Mr. Adams, and the one at the Hyde block were had the day after you understood the settlement had been made, were they not?

A. That is my recollection of the time. I know it was after Mr. Schultz had gone out to Mr. Cowley's one night. I knew, in
202 some way or another, that Mr. Schultz and others had gone out to Mr. Cowley's house to have a settlement with him, and I learned from some of them that they had been out there quite late that night, and a settlement had been agreed upon.

Witness excused.

202½ H. L. PRATHER, called for the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. MITCHELL:

Q. Mr. Prather, you are a resident of this city?

A. Yes, sir.

Q. Were such resident during the month of May, 1888?

A. Yes, sir.

Q. You know the plaintiff in this case, Mr. Cowley?

A. Yes, sir.

Q. Please state whether you had any conversation with Mr. Cowley during the month of May, 1888, about a settlement of the controversy between Mr. Cowley and the Northern Pacific Railroad Company, being an action pending in the District court in this city relative to the land in controversy situated in this city.

A. Well, that I can't answer.

Q. You mean as to time?

A. Yes; I have had some talk with Mr. Cowley, but I don't remember the circumstances or the time particularly.

Q. Well, when had you heard of a settlement having been made in regard to that controversy?

A. Well, I can't answer for the same reason. I don't remember what time it was. I remember of hearing something of the kind, but I didn't charge my memory with it particularly.

Q. When was this conversation with Mr. Cowley with reference to the time you heard of the settlement?

A. I heard of the settlement by hearsay.

Q. When was the conversation with Mr. Cowley with ref-
203 erence to the time when you heard of the settlement? Before or after?

A. Well, I don't remember whether I had heard it first from Mr. Cowley or somebody else; positively, I can't state.

Q. What did Mr. Cowley say to you about any settlement of that controversy?

A. At any time, do you mean?

Q. Yes; it has been about a year since you had the conversation?

A. I judge about a year ago I had some talk with Mr. Cowley.

Q. What was that conversation?

A. I don't believe I could give the exact language.

Q. I am not asking for that.

A. Well, I think it has been about a year ago that I had some talk with Mr. Cowley about a settlement of the dispute between him and the railroad company. I think I commenced the conversation myself, so far as I can remember. I had been around to the post office; perhaps you can get the time from that; it was when the post office was in the Birch block—in the morning—and I saw Mr. Cowley standing at the entrance of the Hyde block, and I think what made me take an interest in it was that there was some talk then either of taking evidence that time in his case before a commissioner or that the case would be up for hearing in some way or had been recently, and I stepped up to Mr. Cowley and asked him how he was coming along with his suit against the railroad company.

Q. Well, what response did he make to that?

A. Well, I don't believe I can recall his exact language.

Q. Well, what was it in substance?

A. Well, so far as I remember, I think he said that the case was settled. He either said it was settled or that he thought it
204 would be settled, and went on to give me some of the details of the settlement. The details I don't remember positively now, but all I remember of it was he said he was to get seven acres of the disputed land, and, I think, $8,000 in cash.

Q. Say anything about what he thought about the settlement?

A. Yes; I think he did.

Q. What was it he said?

A. Well, there was something said about that, but I don't believe I can remember Mr. Cowley's language.

Q. Well, as near as you can.

A. As near as I can remember he said he didn't believe that that was anything like what the land was worth or what he ought to have.

Q. Did he say anything else in that connection?

A. Well, he said something about the uncertainty of the results of the suit, and that he didn't know but it might be best to settle than to prosecute the suit.

Cross-examination by Mr. BLAKE:

Q. This conversation was *now* soon after you understood that it had been settled?

A. Well, my impressions now are, Mr. Blake, that that was the first I heard of the settlement.

Q. This was before the May term of court set, was it not?

A. I can't state positively; my impression is though it was. My impression is, if I remember right, that they were either taking or about to take testimony preparing for the term of court before the referee. It seems to me they were preparing the case then
205 for the May term of court, but I would not state positively about that.

Witness excused.

206 FRANK H. GRAVES, called for the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. MITCHELL:

Q. Mr. Graves, you are an attorney in this city, are you not?
A. Yes, sir.
Q. Have you been for some years?
A. Yes, sir.
Q. You may state if you have received or have in your possession any papers relating to the matter of settlement of the controversy between the Northern Pacific Railroad Company and H. T. Cowley; and, if so, state how they came into your possession and when.
A. Yes; I have certain papers. I have a quitclaim deed drawn from Henry T. Cowley and Lucy A. Cowley, his wife, to the Northern Pacific Railroad Company, bearing date the 16th day of May, 1888, a simple plat of the land in controversy, a certificate of sale from the Northern Pacific Railroad Company to Henry T. Cowley, bearing date the 16th day of May, 1888, and I think that is all the papers I have in my possession that are relative to the case. These papers I have described came into my possession as attorney for Ganahl and Hagan; they gave them to me. I can't tell about the date, except by reference to the papers and to the term of court on which the judgment that this proceeding is to set aside was entered. These papers bear date 16th of May, and court began the third Monday in May, which was about that time, and these papers were given to me directly preceding that term or on the first day of the term; my impression is the first day of the court or the Saturday before—given to me by Mr. Hagan. These papers have been
207 in my possession exclusively ever since that date.
Q. Never passed into the hands of any one else?
A. No, sir.

Cross-examination by Mr. BLAKE:

Q. The May term of court—I will ask you if that didn't begin on the 21st of May?
A. I can't tell you. It began on the third Monday in May, and some time between the day they bear date and the beginning of court I received them.
Q. You think possibly on Saturday before court began?
A. It is my impression. Of course, I can't state with any particular degree of positiveness.
Q. How did they come to be placed in your possession?

A. Gentlemen Ganahl and Hagan employed me to represent their interests in the litigation over this matter, if any should arcise, between Mr. Cowley and them or Mr. Cowley and the railroad, and those, with a numb-r of other papers, were placed in my hands, just handed to me by Mr. Hagan, saying, Here are the papers in the case, and I glanced over them to see what they were, and put them in my safe and kept them there ever since.

Q. That controversy, as you understand it, between Mr. Cowley and Ganahl and Hagan, in which you were employed to look after the interests of Ganahl and Hagan, was this after they had their controversy in the office over their fees?

A. Of course, that was the foundation of the controversy, Mr. Blake; yes, sir. It was to represent them in any matter
208 where their interests as to the matter of fees might come in question. I perhaps should state Ganahl and Hagan were claiming they had made a compromise from which this judgment was entered and from which they were to have a certain amount of fees.

Witness excused.

209 ALBERT HAGAN, called for defendant, being first duly sworn, testified as follows:

Direct examination by Mr. MITCHELL:

Q. Mr. Hagan, state where you reside.
A. My residence is in Coeur d'Alene.
Q. Where were you residing in May, 1888?
A. In Spokane Falls.
Q. Attorney-at-law?
A. I was, sir.
Q. Engaged in practice here?
A. I was engaged in practice here.
Q. At that time you were one of the attorneys for Mr. and Mrs. Cowley?
A. I was attorney for them in May, 1888.
Q. Now, I will ask you to state, Judge, just what took place on the 10th of May, as near as you can remember, between Mr. Cowley and the railroad.
A. I think it was the 10th of May. I have been unable to get the papers from Ganahl. I think it was the 9th or 10th of May last, the proposition for the compromise in that case was made. In pursuance of that, I think it was, you had a talk with me, on the morning that the testimony was to be taken, if I had any proposition for the compromise. I told you none, and asked you if you had any, and you said that you probably might submit me one in an hour or so. I told you that I was ready to go on with the testimony. You came over to the office, and after talking about it, we disputed about where some land was situated. I went with
210 you to see the map in Mr. Newbery's office and Mr. Schultz told me he had authorized you to make a proposition. I

went back to my office and you came over there and submitted a proposition: 1st, of a certain tract of land and $5,000. I told you I didn't think Mr. Cowley or his attorney either would accept it. You then submitted your proposition of $8,000 and this tract of land. I consulted with Judge Ganahl and told Mr. Cowley about it. This matter was talked *pro* and *con*, and I went to you again and wanted to know if that was your ultimatum, and you said, yes; that was all you would do; I then advised Mr. Cowley to accept; at first I submitted the proposition to Mr. Cowley and we talked it all over, *pros* and *cons;* Judge Ganahl was in favor of its acceptance, and I advised Mr. Cowley to accept, and I furthermore told Mr. Cowley that even if he won the suit that there would be a litigation of at least ten years, if the railroad company chose to prolong it; that was also what I said to him. He wanted to consult with Mrs. Cowley and we told him that was right. We were interested in the controversy by written agreement signed by Mr. and Mrs. Cowley both, by which we were to receive one-fourth of all that was received, and he knew that fact at this time. We were to receive one-fourth of this compromise. Mrs. Cowley, I think, came down to the office, because I didn't know anything about her intentions or desires in the matter. The next time I met Mr. Cowley he came down to the Windsor hotel where I lived—myself and family lived there—and he said that he could get more out of that compromise than that. He wanted to know where Mr. Schultze was. I told him he was in town. Said he, "Could I get an interview with him?" Said I, "I will see that you do." He asked me to get Mr. Schultz and come to his house. I had supper and went after Mr. Schultze. He was at the car; they told me he had gone to his car, and I found him
211 and told him that Mr. Cowley and Mrs. Cowley wanted to talk this matter over, and there was something spoken about Mr. Schultze's giving her a lot or two for a church; they wanted that understood. I told Mr. Schultze about it, and told him there was the carriage. He wanted me to go along. We three got into the carriage and went to Mr. Cowley's house and met them there in their reception-room. It was after dark; I don't know what time of night. I don't think Mr. Mitchell nor myself had anything to say; I don't remember that we said anything unless we were asked. The merits and demerits were talked over, as I remember it, about the settlement. The church lots were talked over between Mrs. Cowley and Mr. Schultze. There was something said also about a water pipe or water right, of which I don't remember the details; that I don't remember, but Mr. Schultze said he wouldn't include in this compromise the question of church lots, but he would do this: He himself would give Mrs. Cowley, I think, two lots for church purposes; just where they didn't agree to settle upon, but it was to be outside or inside of certain limits, and exactly where I don't know; but they agreed that Mr. Schultze should make her a present of two lots, but that had nothing to do with the compromise. They agreed upon the terms of the compromise, and it was this: At a certain line there Mr. Cowley was to take seven and one-half acres of land and eight thousand dollars; the land included, I think,

the property with some buildings on it; I think his house. I don't know anything about the lines up there. They then talked about the right of Mr. Cowley to use that pasture up there; he wanted to use some lots for pasture in the meantime. Mr. Schultze didn't care if he used them for pasture, and they fully agreed to that.

212 Mrs. Cowley was present, Mrs. Mitchell and myself, Mr. Schultze and Mr. Cowley, and the papers were to be drawn up at Tacoma on the arrival of Mr. Schultze there and sent back with the $8,000 check or eight thousand dollars, which we calculated would arrive about Tuesday afterward—might be Wednesday; as soon as they could get back. Mr. Cowley and Mr. Schultz and I think Mrs. Cowley shook hands over the proposition. It was agreed to, and Mr. Cowley said to Mr. Mitchell and myself in the presence of those parties to proceed and settle up the case in pursuance of that agreement. I came back to my office—after leaving Mr. Schultze and Mr. Mitchell at the car I came back to my office and drew up a stipulation then and there and signed it, because I had to leave on the train that night for Sprague, and notified Judge Ganahl by note that it was settled. I never saw Mr. Schultze any more that night. I think Mr. Mitchell asked me for the stipulation. During this time I had a power of attorney from Mr. Cowley, which I think I can produce when Judge Gahnahl comes down town, giving me——

Mr. BLAKE: I object to the statement of the contents of that instrument.

I can produce the instrument, I think, if Judge Ganahl hasn't lost it; a power of attorney given me, authorizing a settlement of this case.

Mr. BLAKE: I move to strike out the above.

Q. State, Judge Hagan, what efforts had been made prior to this time, the date you referred to, to making an adjustment or settlement of this case.

A. There had been two or three efforts. Mr. Cowley came to my house when I lived on Riverside avenue and brought a gentleman there by the name of Ritz. I think I advised Mr. Ritz to go East.

213 He went on there. He didn't succeed in settling it. Whether Mr. Cowley paid him any money or not I don't know. It was spoken of at my house about the expense, and I said that I would not pay any expense. Mr. Ritz made reports. Mr. Cowley brought Mr. Ritz to me again, and it was simply to talk over, I suppose, old affairs. Mr. Ritz reported to me at the Grand hotel about what he did. I asked him what he had done, and he wanted a new power of attorney, which I declined to give him unless Mr. Cowley would give it to him. It was about that time that Mr. Cowley gave me the power of attorney that I speak of.

Q. Had that power of attorney from Mr. Cowley given to you been revoked at this 10th day of May?

A. Not that I know of.

Q. Has it ever been revoked since?

A. No. When he tried to change attorneys——

Q. How long was that after the settlement?

A. I think Mr. Cowley gave me, so far as he could give me, notice on the 17th of May, 1888, of dismissal as his att'y.

Q. What was said up to the house to whom the papers should be sent to?

A. They should be sent to us through the First National bank. The money was to be paid through the First National bank—that is, Mr. Schultze remarked that he would pay it through the First National bank.

Q. Did you ever receive these papers?

A. Yes, sir. At the date we calculated they would arrive they arrived.

Q. Did Mr. Schultze name a particular date when they would arrive?

A. We calculated—I had it in my head it would be on
214 Tuesday, but I wouldn't be certain as to that. I know they came at the time we thought they would get here.

Q. Did the money come with them?

A. Yes, sir.

Q. Who presented these papers to you?

A. Mr. Glover.

Q. Who was there at the time?

A. I wouldn't be certain. Judge Ganahl was in the adjoining office.

Q. Was Mr. Cowley there?

A. Not then. He was there in a few minutes. I wouldn't be certain as to that; at any rate, he was there a few minutes.

Q. Was he there while Mr. Glover was there?

A. That I wouldn't be certain. At any rate, I showed him the papers and told him that everything was complete.

Q. State if these were the papers that were received. (Shows witness the papers.)

A. I should judge these were the papers. These are the papers, I think; contract or certificate of purchase like this.

Q. To whom did you deli-er the papers?

A. I took them into the office of Mr. Cowley and said, Here are our papers, and he examined them.

Q. He examined them?

A. Yes, sir; and he wanted at that time a little further time. He gave as his reason that his wife did not know about it.

Q. How do these papers correspond with the agreem-nt made?

Mr. BURKE: I object to the last question, as it is incompetent, irrelevant, and immaterial.

215 REFEREE: I sustain objection.

A. They contain the agreement that Mr. Cowley and Mr. Schultze entered into that night that I spoke of.

Mr. BLAKE: I move to strike out the answer of the witness.

Q. Now, in the conversation between Mr. Cowley and Mr. Schultze

at the house was anything said about the boundaries of this land and how it should be described?

A. Yes, sir; there was; but I wouldn't attempt to give that.

Q. Was any reference made at that time to any map or anything said between Mr. Cowley and Mr. Schultze about a map which they had once gone over?

Q. They spoke something of that; they spoke of knowing it and about the settlement of this matter and of the map and details and of the agreement; at any rate, both of them understood the boundaries of the tract of land, because they went on and spoke about a fence and water pipe.

Q. Was anything said at the house, in conversation there, about his reducing any proposition to writing?

A. Mr. Cowley said to Mr. Mitchell and myself, as well as Mr. Schultze said so, too, to proceed now and carry out this agreement that they had then and there made. I said that I would put the matter in writing; I said, at any rate, that I would reduce the matter to writing. You, Mitchell, made the remark that you were going away.

Q. I mean was anything said about reducing the matter to a written document transferring the land?

A. Mr. Schultze was to prepare this at Tacoma and send it back here by mail, and also a quitclaim deed to the rest of the land, which Mr. Cowley was to make upon the receipt of his certificate of
216 purchase for the land sold to him or given him.

Q. What was said there about the disposition of this case in court?

A. That was to be the end of the case; that was the full compromise of the case.

Q. Anything said about the payment of the costs of the case?

A. Yes, sir; Mr. Cowley spoke of that. You, Mitchell, said that the Northern Pacific would pay all the costs of the case; that it was their case; and I said something about it, too—that you ought to pay it. At any rate, you said that you would pay it (the costs).

Q. Between whom at the house was this conversation mostly carried on?

A. Between Mr. Schultze and Mr. and Mrs. Cowley, at Mr. Cowley's house.

Q. What was spoken concerning the settlement by Mr. Cowley after it had all been agreed upon?

A. Well, there was several remarks made. I don't remember anything special. They all three of them congratulated themselves it was over, but what special remarks was made I can't call to mind. That was the substance of it.

Q. Now, had Mr. Cowley seen Mr. Schultze before Mrs. Cowley was brought down during the day?

A. That I don't know. If he did I never knew it. He asked me to bring Mr. Schultze down; he asked me to go to Mr. Schultze and bring him down; he wanted me to do it. We were then stopping in the Windsor hotel. It was about supper-time. He said Mrs. Cowley would rather talk to Mr. Schultze about it. I fully agreed

to it. He asked me if I wouldn't bring him, Schultze, up.
217 I got a carriage and took him to Mr. Cowley's.

Q. What did I say about going? Did I make any objection?

A. Yes; I remember you said something that you didn't care about advising other attorneys' clients, but Schultze said, "Come and go along. We may have to draw the matter up. I hate to go up there alone." It was dark when we got there. It was the first time I was ever at the house.

Q. Have you in your possession or can you produce here the power of attorney you spoke of?

A. I can, I think, if I can find Mr. Ganahl. I left it with him when I went to Idaho. I think I can get that power of attorney and produce it. It was with him the last time I saw it.

Q. Had Mr. Cowley consulted with you before about the matter of settlement in this case before this date?

A. Yes, sir.

Q. Tell all you recollect of that conversation at the house.

A. Well, sir, I wouldn't undertake to detail all that conversation.

Q. I will ask you if on the day during the day when Mr. Cowley asked for further time what you said at that time.

A. I think I answered when he wanted to see Mrs. Cowley I told him that was all right, and he went to see her.

Q. When she was brought down did they ask for further time?

A. Yes; Mrs. Cowley insisted for further time.

Q. Did you say anything about deciding then and there?

A. I said some time during that day to them I either wanted the case settled or would go on and try it. The case had been lagging along and had been postponed once or twice, and I made the
218 remark some time during the day that I would like to have the matter settled or go on to trial.

Cross-examination by Mr. BLAKE:

Q. Now, where was it that you first met Mr. Mitchell in this city when that case was going to be heard last May?

A. He came into my office, I think, that morning.

Q. The morning the case was to be tried?

A. That is my impression.

Q. It was in that conversation that he asked you if you had any proposition of compromise?

A. Well, you might say it was, too; it was in a few minutes. You might say so. He asked me if I was ready to go on to trial. I said, Yes. He asked me if I had any further propositions. I said, No. That was the substance of what was said, at any rate.

Q. What did he say to that?

A. Nothing until he saw Mr. Schultze.

Q. About what time in the day was that?

A. In the morning.

Q. You say you saw Mr. Schultze shortly afterwards and had a conversation with him?

A. Mr. Mitchell came back over to the office—it was then about time to go on with the case, as I told you—and made this proposition. First, if I remember rightly, we got into a dispute about where the lines run. I then went with him over to Mr. Newbery's office, where I saw a map. I came back then and Mr. Mitchell offered what I told you he said was his ultimatum offer; that was $8,000 and this land.

Q. Had you seen Mr. Schultze up to this time?

219 A. Yes, sir; I think that was the first time I ever saw him in my life.

Q. What was Mr. Mitchell's first proposition, did you say?

A. He spoke of this land and $5,000. I didn't think Mr. Cowley would accept. I didn't think we would.

Q. You said in your examination-in-chief that you saw Mr. Schultze that morning somewhere and he told you that Mr. Mitchell was authorized to make a proposition.

A. That was the time I spoke of when we went over to Newbery's office.

Q. What time of the day was that?

A. Well, Mr. Blake, I wouldn't be positive.

Q. Did Mr. Schultze tell you what the proposition authorized was?

A. He did not. Mr. Mitchell did.

Q. Now, you say that after Mr. Mitchell made this proposition you saw Mr. Cowley and told him of the offer they made?

A. Yes, sir.

Q. Where was that?

A. At Judge Ganahl's office.

Q. Who was present?

A. Well, I wouldn't be certain as to that. I know that Ganahl and myself and Mr. Cowley were present. Mr. Mitchell—whether he was present at this first time, I wouldn't be certain; I wouldn't undertake to say.

Q. No, in order to refresh your recollection, I will ask you—you simply informed Mr. Cowley in the forenoon that there had

220 been some proposition made, but you didn't tell the offer in full till Mrs. Cowley came down in the afternoon?

A. I explained to Mr. Cowley the proposition. I don't think his wife was present that first time, and for this reason I think Mr. Cowley wanted to see his wife. I think Judge Ganahl told him to bring her down. But as to the details of the conversation as to that, that might have been afterwards; but we had an understanding and Mr. Cowley understood the proposition, but he wanted to see his wife, which we thought was proper, and we told him to see her.

Q. Well, she did come down in the afternoon?

A. Yes, sir.

Q. And was that your office?

A. At Judge Ganahl's office.

Q. And you and Mr. Ganahl were there and some of the witnesses?

A. I was there part of the time—very little of the time. Mr. Cowley brought two or three parties there that day as witnesses.

Q. Were you present when the matter was talked over between the parties present in Mr. Ganahl's office in the afternoon when Mrs. Cowley was present?

A. Part of the time.

Q. What do you remember about that conversation?

A. I think Mrs. Cowley was a little opposed to taking the proposition.

Q. Didn't she quite strenuously oppose it?

A. She did on account of the length of time she had to decide in. The time was too short, she said, and she didn't like it.

221 Q. Do you remember whether Mr. Cowley left your office first that afternoon after this conversation?

A. No; it wasn't in my office. I don't remember who left first.

Q. What I want to know is how you separated and what was the understanding in regard to the matter when you separated that afternoon?

A. Well, I can only tell you my understanding, Mr. Blake. Mr. Cowley was willing to accept the proposition if his wife was satisfied about it, and she, of course, wanted to consult about it or something. I was willing to give Mrs. Cowley the time, but I had to go away to Sprague to court, so did Mr. Schultze wish to go away that day, and for that reason I decided to have them determine this matter that day.

Q. Didn't you say the matter would have to be settled that day for these reasons that you have mentioned?

A. I think it very likely. It is very likely that I said it.

Q. There had been nothing like an agreement between the parties in your presence up to the time Mr. Cowley met you at the Windsor hotel in the evening?

A. Well, no; I don't think there had been a positive acceptance or rejection of the offer. I told Mr. Cowley that I thought he had better accept the compromise, and he thought if I was of that opinion he would accept it, and he came down to the hotel because I had to go off on some other business. I will state, as far as he was concerned, he hadn't authorized me to draw any papers, but said he would accept it if I said so. He said he would like to see Mr. Schultze, and I advised him to see him. I wanted the matter settled one way or the other.

222 Q. Were you expecting Mr. Cowley down at the hotel or were you expecting to see him at any other place that evening?

A. I was expecting to see him at my office.

Q. Did you expect to have any definite understanding in any further conversation with Mr. Schultze or Mr. Mitchell that evening?

A. Not at that time.

Q. Had either Mr. Cowley or his wife met either Mr. Schultze or Mr. Mitchell in your presence that day up to the time you all met them at Mr. Cowley's house in the evening?

A. Not that I know of. Mr. Mitchell might have met Mr. Cowley.

Q. That was in your presence?

A. No; I don't remember that.

Q. You say you had a definite proposition from Mr. Schultze. Now, I will ask you if the occasion of asking Mr. Mitchell and Schultze to go to Mr. Cowley's house wasn't to arrange in regard to those church lots?

A. No, sir; Mr. Cowley did say something about that when he said he wanted to see Mr. Schultze; wanted to talk about church lots and wanted to see him about that also.

Q. Wasn't that the sole reason of that meeting?

A. I can't say that, Mr. Blake; no, it could not have been. How to pay the money, &c., hadn't been definitely settled, although it was understood to be paid to us.

Q. That is not what I am after. I am trying to find out what was the occasion of going to Mr. Cowley's house that night.

A. Mr. Cowley told me that Mrs. Cowley was feeling badly about settling this case. I asked, Why don't you and she both see
223 Mr. Schultze? And he wanted to know if he could see him and where it was he stopped. I said I thought at the Grand hotel. I didn't know at the time that he had a car. I went to the car to get Mr. Schultze and went with him up to the house.

Q. Now, as a matter of fact, you got Mr. Schultze and Mitchell and all went up together?

A. Yes, sir.

Q. The particular conversation at the house was carried on by and between Mr. Schultze on the one hand and Mr. Cowley and his wife on the other, and you and Mr. Mitchell didn't take much part except to answer questions, isn't that true?

A. I think so. I know I didn't talk farther than to give Mr. Cowley the proper advice in legal matters.

Q. What was said by anybody there at that time as to the terms of the proposed compromise and who said it?

A. It came up in the conversation between these three parties; all of them understood what the terms were. Mr. Schultze detailed them. Mr. Cowley talked them over and Mrs. Cowley talked them over. Nobody repeated them over and over again. They were definitely understood there. It was all talked over, Mr. Blake. If I remember aright, Mr. Schultze first started out on it in response to Mrs. Cowley's saying something about her wanting to see him.

Q. There was no set statement of the proposition made there by anybody?

A. No, sir; no formal statement by any one party. It was all talked over and understood thoroughly.

Q. It was understood thoroughly by all parties before you went up there?

224 A. I think so; yes, sir.

Q. And the terms of the proposition were referred to in that conversation and were understood at that time?

A. Yes; they went into some minute terms about this land. I

don't know the boundaries of that land, but they spoke of that and this water pipe, and also Mr. Cowley wanted them to help to abate a nuisance there also on the land. We passed by it that night and I said that I thought it was an outrage—a very bad smell there or something. I took it to be a slaughter-house.

Q. And was the papers—were they to be prepared at Tacoma?

A. Yes, sir; Mr. Schultze was to send them—was *the* draw the proper description and send the money back here. For some reason he had to be there to get the money.

Q. Do you mean to say that the only reason the papers were not prepared and signed that night was that the proper description of the land wasn't to be had here in this city?

A. No, sir; I will say this: That the train that went East at that time went about midnight—somewhere about that time. Mr. Schultz wanted to go on West. I don't know any farther reason, except that they said they would draw them up and send them back.

Q. That wasn't any reason at all, then?

A. That was the understanding.

Q. Now, it was understood there at Mr. Cowley's house that this quitclaim deed which has been shown to you as to be executed by Mr. and Mrs. Cowley and this certificate of sale of the land—the seven and a half acres—that they were to come together with the money, and should be sent from Tacoma to this city, and that the execution of that deed by Mr. and Mrs. Cowley, and on the
225 delivery of the deed to *of* the First National Bank the $8,000 should be paid?

A. Yes, sir.

Q. And it was further understood and talked over in that conversation with Mr. Cowley that the railroad company should pay the costs of the suit and it should be dismissed?

A. No; we were not told to dismiss the suit. It was an action of ejectment to which we filed a cross-bill. The R. R. Co. were to pay the costs of the suit.

Q. I will ask you, Mr. Hagan, if this is not true: That it was thoroughly understood between the parties there that in that sense this settlement was accomplished by the delivery of the quitclaim deed and the payment of the money—$8,000; that the case then pending in the district court in this city should be dismissed and the railroad company pay the costs?

A. Of course, while it was not stated that way, it was my understanding as attorney in the case that it was not to be dismissed till this thing was done.

Q. Wasn't it your understanding further that as soon as this thing was done this case was to be dismissed.

A. Mr. Cowley was to take seven and a half acres of this land and the railroad company was to take the rest. I considered that the railroad in signing this agreement—that he was entitled to his portion.

Q. And you further understood that the railroad company were to get their portion by the execution and delivery of the quitclaim

deed, and Mr. Cowley was to get his portion by the delivery of this certificate of sale?

A. Mr. Cowley was to quitclaim his interest in that property.

Q. That is the way you understood that settlement was to be effected?

226 A. Yes, sir; he was to make quitclaim deed, and that was agreed on.

Q. Now, you say somebody said on that occasion at Mr. Cowley's, that night, that you should go ahead and draw up the necessary papers to settle this case. Now, who said that and what was it?

A. The attorneys were to proceed and settle the case; draw up the papers, &c.; draw up a written stipulation embodying this agreement.

Q. Was there anything said on this occasion about your drawing up a stipulation embodying this agreement?

A. It was said: We, as attorneys, should now proceed and settle this matter up.

Q. You understood from that that what you were to do in the matter was to dispose of this case in court after this quitclaim deed had been delivered and settlement made?

A. I would do nothing in this case till that money was sent on and those papers executed, and I made the remark there, Mr. Blake, that I would draw up the necessary stipulation.

Q. Was there anything said at that time about what the stipulation should be?

A. No, sir.

Q. You say you did draw up some sort of a memorandum that night at your office?

A. Yes, sir.

Q. Have you that memorandum with you?

A. No, sir.

Q. Do you know where it is?

A. I don't know. I handed it to Mr. Mitchell, and I
227 didn't desire that he should file that and I made him copy it and add to it.

Q. You say you don't know where that memorandum is?

A. It may be amongst Mr. Ganahl's papers here.

Q. Now, you say you and Mr. Mitchell and Mr. Schultze left that night on the train for the West?

A. I did; I don't know whether they did or not.

Q. Did either of these gentlemen go to your office with you?

A. No, sir; I had a good many things to attend to.

Q. After you parted with Mr. Mitchell and Mr. Schultze at the car you didn't see anything more of them till when?

A. Never saw Mr. Schultze any more till about a month ago; never saw Mr. Mitchell again until about the time when the court met a few days afterwards. I think it was a very few days.

Q. I will ask you if you remember whether it wasn't the 21st of May.

A. It was along there somewhere.

Q. Then Mr. Mitchell didn't sign that memorandum that you wrote in your office?

A. No, sir.

Q. Never did sign it?

A. Not that I know of; he might have signed it; I don't know; I handed it to him.

Q. When did you hand it to him?

A. That morning when he came back to court.

Q. I will get you to look at this record in that case (shows witness papers) and say whether that paper that you hold in your hand, purporting to be the stipulation in that case, was signed by your firm, Ganahl & Hagan.

228 A. It was signed by me for the firm.

Q. The first day of court?

A. Yes, sir; the day it is filed.

Q. May 21-st?

A. I think so; wouldn't be certain about the date.

Q. It was on the day it was filed?

A. The day Mr. Mitchell came here; I think it was filed then and there.

Q. You wrote that paper?

A. I don't know; I think Mr. Mitchell.

Q. Where did you sign it?

A. I think I signed it in the court-room that morning. I think he suggested this last change down here and he wrote it out himself; at any rate, he either had it written or wrote it himself, because he handed it to me and I signed it.

Q. Did he sign it at the same time and place?

A. Yes, sir.

Q. It was signed when he handed it to you?

A. I don't remember that; I saw him sign it.

Q. Turn to the next sheet in the record, if you please, Mr. Hagan, purporting to be a satisfaction of that written stipulation and the judgment referred to, and tell the court if you signed that for your firm.

A. That looks like my handwriting. I think I did.

Q. You may tell the court if it was signed at the same time and place that the stipulation was.

A. It is my handwriting. I signed it. I don't remember when.

229 Q. That is your handwriting.

A. Yes, sir.

Q. Well, on refreshing your memory I will ask you if you didn't sign it at the same time and place you signed the stipulation.

A. It is very likely I did. I can't call it to mind. I know something was talked about it. I told Mr. Mitchell I had received those documents for Mr. Cowley, and I think May 16th was the time I received them, but of that I wouldn't be positive. I think it was about May 16th. Got them in the morning. It is very likely, Mr. Blake, that I signed that the same day. It recites facts as they existed.

Q. Were you in court on the afternoon of that day—first day of the term—when these papers were filed and the judgment was taken?

A. I was present when the judgment was taken.

Q. Don't remember whether it was the forenoon or afternoon?

A. I was present when the judgment was ordered.

Q. Give your impression whether it was the forenoon or *fa*ternoon.

A. I have the impression it was the forenoon, but I wouldn't be certain; I have the impression it was the forenoon.

Q. Do you remember the date you received the quitclaim deed and certificate of purchase from Mr. Glover?

Q. You mean the date?

Q. The date of the day of the week.

A. I have the impression it was Tuesday. I may be wrong. It was the day we all calculated they would get here. They came here that date.

Q. And Mr. Glover delivered you the quitclaim deed, the
230 certificate of sale, and the map that you have identified, and nothing more?

A. And told me that the money was in the bank.

Q. Ready to be paid on the execution of the deed?

A. Yes, sir.

Q. You say Mr. Cowley came in or you saw him shortly afterwards, you think. Now, might that not be that you saw him immediately before that?

A. I might have, but I saw him afterwards also, because I read these papers to him.

Q. Where did you read the papers to him, Mr. Hagan?

A. In Mr. Ganahl's office, adjoining mine.

Q. You mean to say you read the whole paper?

A. I will correct that. I just said, "Here is the description."

Q. You didn't read them at all, but called his attention to the matter?

A. I don't think I read them at all. I stated, "These are the papers, and they are correct."

Q. You spoke of the offer to settle this case through Mr. Ritz prior to this time. When was that, Mr. Hagan?

A. Well, let me see; it was in the winter some time, I think. If I had these papers I spoke of I could tell you the exact date.

Q. When did you say it was Mr. Cowley gave you a notice of your discharge in this case?

Mr. MITCHELL: I object.

REFEREE: I sustain the objection.

A. Mr. Cowley gave me two notices—one on the 16th and one on the 17th of May. The one on the 17th of May is where he
231 undertook to finally discharge me from the case. 16th, it was a conditional discharge. I have the two notices here.

Q. I will ask you if it is not a fact that along during the week before court, the week in which the 16th and 17th occur, there were

not consultations and propositions passing between you and your firm and Mr. Cowley, both verbal and written, looking to your retirement from the case and the settlement of your fees.

Mr. MITCHELL: I object.

REFEREE: I reserve my decision.

A. Yes, sir: there were. I think they were confined—I think, to these two dates, the 16th and 17th, and possibly the 15th.

Q. I will ask you also if there wasn't a proposition on the part of Mr. Cowley that additional and assistant counsel should be employed in connection with this case.

Mr. MITCHELL: I object to the last question as immaterial, irrelevant, and not proper cross-examination.

REFEREE: I reserve my decision.

A. Yes, sir; Mr. Cowley wanted yourself and Mr. Redpath not only to assist, but, as I understood Mr. Cowley, to take charge of the case. I never had any objection to you personally, but I did have objection to any other counsel having charge of that case. I didn't object to you gentlemen personally, but to the fact.

Q. This was subsequent to the night you met at Mr. Cowley's and prior to the time when court set?

A. Yes, sir, and intermediate.

Q. I will ask you if you remember any occasion of Mr. Cowley coming to your office with Maj. Routhe, of this city.

Mr. MITCHELL: I object.

232 REFEREE: I reserve my decision.

A. I remember of Mr. Ruth: yes. Mr. Cowley came, too. I think in Judge Ganahl's office. I was present at any rate, and I think it was in Judge Ganahl's office.

Q. I will ask you if you didn't have some conversation in which he proposed that assistant counsel should be engaged and you refused.

Mr. MITCHELL: I object.

REFEREE: I reserve my decision.

A. I refused in all of the interviews to allow any one to take charge of this case or the control of it out of my hands.

Q. I am directing your attention to this particular conversation?

A. I think that I declined to permit any counsel to take that case out of my hands.

Q. I will ask you if he didn't in the conversation in which Maj. Ruths was present propose assistant counsel, not proposing to discharge you.

Mr. MITCHELL: I object.

REFEREE: I reserve my decision.

A. Yes; I suppose that was the fact, for according to his proposition which he agreed to with me that day he agreed to pay me $4,000 and then I would let him get all the attorneys he wished.

Q. Didn't you then and there refuse and tell Mr. Cowley that you were in the case, and if it was to be tried you were going to try it?

Mr. MITCHELL: I object.

REFEREE: I had rather reserve my decision.

A. I did.

233 Q. And didn't you tell him in the same conversation that there was nothing in the way of a trial of the case and if he wanted it tried you would go ahead and try it?

A. I told him this: That there was nothing to prevent me trying that case; that I understood it, I thought, better than any attorney in the town, having tried, as I mentioned to him, two similar cases, and I proposed to try this case.

Q. Was that on the same day that this written discharge was given?

A. No, sir; I think not. I think it was on the 16th. I may be mistaken about these dates. I think on the 16th Mr. Cowley came up and offered to pay us this money, $4,000. I told him I would gladly give up the case if he would pay me. I would assist any counsel he had and let him take charge of the case.

Q. If you were paid?

A. Yes, sir; give him my memoranda and things of that kind and assist his counsel clear through the case.

Q. That conversation was after he refused to sign the quitclaim deed and before court opened?

A. Yes, sir; he told me he would be down at five o'clock or see me before he went home. Instead of that, at 10 o'clock I received a notice telling me he would give $1,000 and no more.

Q. You refer to your fee?

A. Yes, sir; that was the only ground upon which I would give up the control of this case. You or anybody else might take the control, but I didn't intend to assist.

Q. Look at this letter, Mr. Hagan.

A. Yes, sir; I have a copy of it here.

234 Q. Did you sign that?

A. Yes, sir; it was in reply to his offer. As I told you, it was on the night of the 16th that he served me this notice. Somebody brought it up to me, and I was in bed. He handed me this notice at 10 o'clock at night. That was my reply to it the next day.

Q. Written on the 17th?

A. I think so. The proper date, whatever it was. I think I went to the referee and said I wanted to put all things in evidence and report it to the court. I suppose the referee did it; I don't know.

Q. You said you went to the referee and said that?

A. To give all the parties notice; take the evidence and have it referred back to the court.

Q. That was on the 17th?

A. I think that was on the 17th. The letter speaks of it.

Q. I will ask you if your firm received the notice from the referee.

A. I think we did. I didn't get it. I wasn't in the office any more that day.

Q. You understood that the taking of the testimony was to be resumed on the following Monday?

A. Yes, sir.

Mr. MITCHELL: I object on the ground that that is not proper cross-examination—the introduction of the letter. Referee received letter in evidence, and the same was marked Exhibit "Ex." for identification.

235 Redirect examination by Mr. MITCHELL:

Q. To whom were those papers delivered—those papers received from Mr. Glover—after you had submitted them to Mr. Cowley? Into whose possession were they given by yourself and Judge Ganahl?

A. Graves—Frank Graves. That was some few days afterwards, though. I think I had them some 10 or 15 days, perhaps; came down and handed them to Mr. Graves and asked him to represent me. I was away for a few days.

Q. Did you read the description?

A. Yes, sir; as shown by that map. I told him I didn't know anything about it—the correct description—and referred him to the map. I was satisfied they were correct. There was no question about that. Mr. Cowley was opposed to settling for some reason, I think, on that occasion.

Q. This settlement was made on the 10th of May, you say. Anything said about this settlement on Friday or Saturday after the settlement?

A. I never heard Mr. Cowley say anything against the settlement till the—I wouldn't be certain—somewhere on the first of the week. He was dissatisfied about it; he told me so. This was on the first part of the week—Tuesday or Wednesday. I wouldn't set the dates, but I never came clear to the surface till those papers came.

Q. Did Mr. Cowley ever say to you, when at the Windsor hotel, prior to your coming down to find Mr. Schultze, that he would accept the proposition, provided you would be responsible for it and guarantee to him that what you had advised him in relation to the case was correct?

236 A. I don't remember. That would be a singular guarantee for an attorney to make.

Q. Was anything of that kind discussed?

A. No. Mr. Cowley asked me if certain things were of my opinion again and again and I told him.

Furthermore witness sayeth not.

120 to 147, inclusive.

ALBERT HAGAN.

237 Mr. PAUL SCHULTZE, called for defendant, being first duly sworn, testified as follows:

Direct examination by Mr. ASHTON:

Q. Mr. Schultze, state your residence and occupation.

A. Occupation, general land agent for the Northern Pacific Railroad Company; my residence, Portland; office, at Tacoma.

Q. How long has your office been there?

A. At Tacoma?

Q. Yes, sir.

A. Since the 13th of June, 1887.

Q. Are you acquainted with Mr. Cowley, the plaintiff in this action?

A. I have the pleasure.

Q. State as near as you can the length of time you have known him.

A. Well, from some time in January, '83 (when he kindly acted for me in Seloquoia).

Q. Do you recol-ect any negotiations for a settlement of an action heretofore pending between the Northern Pacific Railroad Company and Mr. Cowley on or about the 10th day of May, 1888?

A. Before that?

Q. On or about.

A. Before, you mean?

Q. At the time do you recollect any negotiations for a settlement or an action of that kind?

A. Quite distinctly.

238 Q. Before asking you what you know about that subject I will ask you to state what power or authority, if any, you have relative to the lands of the Northern Pacific railroad within your jurisdiction.

A. I have general authority to dispose of the same at prices which, under certain restrictions, are fixed by myself, and whatever agreements or contracts are signed by me are absolutely binding upon the company. I am the only person authorized in Oregon, Washington Territory, and Idaho to make any agreement or contract to bind the company so far as relates to the disposal of land.

Q. State whether or not you have ever procured or had special authority relative to the land involved in the action that I just referred to?

A. I secured special authority of the board of trustees, who authorized me to compromise for the sum of $15,000.

Mr. BLAKE: I wish to object to this answer for the reason that the method of the witness in securing special authority is not material.

REFEREE: I reserve my decision.

Q. When did you get this authority from the board?

A. I don't remember the date. Some time in January or February last year.

Q. Did you know that it was open for settlement at that time; and, if so, how did you acquire that knowledge?

A. Passing through here in December, Mr. Glover—December, 1887, that was—stated to me that he believed that this suit could be compromised.

Q. Prior to this time did you have any conversation with the plaintiff or Mrs. Cowley looking to a settlement?

239 A. Had several conversations with Mrs. Cowley; don't remember the dates; one in '83 with Mr. Cowley.

Q. Begin, please, with the statement which you say you remember, and which occurred on or about the 10th of May last, and state fully and in detail everything you know pertaining to that settlement and the negotiations leading thereto.

A. I arrived the 10th of May last year direct from New York in order to testify here in this case that day. The train was a little late. The hearing, I think, was postponed in order to give me an opportunity to testify, and I then told Mr. Mitchell, my counsel, that I was willing to compromise this case by paying Mr. Cowley $8,000 in cash and deeding to him a certain part of the land in controversy—equal to about two blocks and a third, 30 lots—some 7 and a half—and instructed Mr. Mitchell, if he thought best, to settle the case upon that bases. Later on Mr. Cowley called to see me, and stated that he had been told that I desired to see him; whereupon I stated that I had not requested an interview with him, but that I was ready to see him then, and I then stated to him in a general way the terms on which I was willing to compromise with him. He asked me to put my proposition in writing. I told him that I would do nothing of the kind, except upon the advise of counsel; that my attorney was not present, and till I could see him I would make no statement in writing. I don't now remember the exact details; only remember this point, that I refused to make a proposition in writing except on counsel's saying so. The matter was dropped there. I may have seen Mr. Cowley some time in the afternoon, yet I don't remember that. During the afternoon Mr. Mitchell came to see me several times. I

240 think upon one occasion I met Judge Hagan and he asked me if this was the best I could do, and I told him I couldn't do any better and my proposition had to be accepted that day, before my leaving for the train west; if that proposition was not accepted the case would have to go to trial. Later on in the evening, possibly between 8 and 9, while I was at my car, Mr. Mitchell being there, too, Judge Hagan drove over in the carriage and stated to me that Mr. Cowley had advised him that Mrs. Cowley desired to see me in this matter; that he thought the matter could be straightened if I would go up and see Mrs. Cowley and Mrs. Cowley together. I would go provided Mr. Mitchell would accompany me, and Judge Hagan would be present also as counsel for Mr. Cowley, so that the matter could be settled then and there. Mr. Cowley took me to the sitting-room, and I found Mrs. Cowley there and the children—I don't remember how many—and I stated no less than three times, clearly, my proposition. Mrs. Cowley mentioned something that

she was satisfied, but that she wanted, I think, three lots for a church. I told her this matter could not be mixed up with this compromise; it would stand upon its own merits. The first question was about whether or not my proposition was to be accepted. I suppose I stated it over again. Mr. and Mrs. Cowley accepted the proposition. I stated that I was going to leave that night, and that everything should be fully understood. Deed to this particular tract of land and the boundaries were talked over. Mr. and Mrs. Cowley were perfectly familiar with the boundaries of the land, and we then discussed how soon and when the papers and money could be here. I said that I would have to lay over at Yakima and wouldn't reach Tacoma till Sunday morning—this occurred on Thursday—and that I would not be able to attend to the matter on Sunday,
241 but that the papers would be drawn up on Monday and the money and papers sent by express that night, and would arrive in Spokane Falls Wednesday morning, I think it was. The papers would be sent to Mr. Glover, president of the First National bank, and he would be instructed by me to deliver to Mr. Cowley or his attorneys the certificate of sale covering the 7 and a half acres and pay the money, the $8,000, in cash upon Mr. Cowley's delivering to Mr. Glover a quitclaim deed covering the amount which he had claimed; which points were described at length in every detail, so as to leave no point to be questioned, and I asked Mr. Cowley if everything was fully understood in regard to the settlement. I then said the rest was to be done by our attorneys. I understood Judge Hagan represented him, to which Mr. Cowley naturally assented. I said we will leave the rest to our attorneys; they will draw up the papers and all that remains to be done. I shook hands upon this proposition. I then talked about the church lots. I think Mrs. Cowley wanted three or four lots. I was willing to give her only two. Inasmuch as I had never done very much for the church, I could buy two for the church or three. I would probably have to pay the company for them. Mr. Cowley also mentioned he should like to use for a pasture certain lots he had fenced in. I said I hadn't the slighest objection, providing he would turn over the lots as soon as I was ready to put them on the market. He was willing to use the lots and then take off whatever fences, &c., there was. I left, understanding an absolute settlement had been made. My attorney had received my instructions from me, and Mr. and Mrs. Cowley gave the instructions to their attorney in my presence. I carried
242 out my part of the agreement to the letter. The papers were prepared at Tacoma on Monday. The certificate of sale was signed by myself, and I placed the money in the bank. Mr. Mitchell prepared a quitclaim deed to be signed by Mr. and Mrs. Cowley. All was directed by Mr. Mitchell to Mr. Glover, with a letter of instructions from me to hand over and deliver the papers and pay over the money to Mr. and Mrs. Cowley or their attorneys upon their delivering to Mr. Glover the quitclaim deed signed by Mr. and Mrs. Cowley, properly executed and acknowledged. That was my share in the transaction.

Q. Do you know of your own knowledge what became of that money and the papers which were sent to Mr. Glover?

A. I understood he gave the papers, he gave over the certificate, and that he left this money subject to the order of Mr. H. T. Cowley or attorneys.

Q. Have you ever in any way withdrawn or directed any party or parties to withdraw that money or papers or in any — change the present condition?

A. In no manner, shape, or form.

Q. Matters, then, now, so far as you know, remain in the same condition as they were in on the day you refer to?

A. Exactly.

Cross-examination by Mr. BLAKE:

Q. You spoke of the power and authority you have to dispose of the lands of the company. I will ask you whether that is in writing?

A. No, sir; it is not.

Q. In what manner is that power given you by the directors?

A. A general resolution of the board of directors.

Q. And that resolution is upon the records of the company?

243 A. Yes, sir.

Q. And are not certified copies or printed copies of those records sent to these land agents?

A. Never. I never knew of their sending one.

Q. You say that you had special authority in this special case?

A. Yes, sir.

Q. When was that received?

A. I think I gave the answer before. I told you I couldn't remember the date—some time in January or February of '88.

Q. That action was taken by the board when you were in New York?

A. Yes, sir.

Q. Just before you arrived here to give your testimony?

A. No, sir; two months before.

Q. On that trip?

A. Yes, sir.

Q. That authority was by resolution of the board?

A. First by the committee and then by the board of directors.

Q. Did you take a copy of that authority?

A. I took it; yes, sir.

Q. You haven't it with you?

A. No, sir; but I can assure you——

Q. I haven't any doubt of it. You say they gave you power to compromise the case at a sum not to exceed $1,500?

A. Yes, sir.

Q. Was there anything said in that connection about giving Mr. Cowley any part of the land?

A. I don't remember that there was. I proposed to do that, inasmuch as Mrs. Cowley had always made it a point to reserve

244 that land for her family, and it was always my intention to let her have that land if she desired it.

Q. You found Mr. Mitchell here in this city when you arrived from the East?

A. Waiting for me; yes, sir.

Q. And the understanding was your testimony was to be taken in the case?

A. Yes, sir.

Q. What time in the day did you first meet Mr. Mitchell?

A. Can't tell—11 o'clock.

Q. Was that on the 10th?

A. Some time between 10 and 11 o'clock. The train was late.

Q. You then told him you would compromise this case in the manner you spoke of?

A. Yes, sir.

Q. He spoke to you first or you to him?

A. In all likelihood I spoke to him first.

Q. You then and there gave him the exact terms that you stated during the whole day?

A. I gave him the outside limits. I told him, however, to get it for less.

Q. How is that?

A. I gave him the outside limits and told him to get it for less money.

Q. I understood you to say awhile ago—I may have been mistaken—that you at first instructed him that you would pay $8,000 in money and give this 7 or 7 and a half acres of land. Was I correct about that?

245 A. Yes, sir; that was the limit to which I was going to go.

Q. You saw Mr. Cowley later in the day?

A. Yes, sir.

Q. Where was he?

A. In Newbery's office; I saw him first there.

Q. And had a conversation with him in regard to the matter?

A. I had.

Q. Did you state to him the terms that you had stated to Mr. Mitchell?

A. In a general way. I told him about the proposed compromise and the terms.

Q. And he asked you to put the proposition in writing, and you refused, on the ground that you would do nothing of the sort without seeing counsel?

A. Yes, sir.

Q. Later in the day, as I understand, you went to the house with Mr. Cowley?

A. Yes, sir.

Q. That was after night?

A. After night—after dark.

Q. There the matter was again talked over?

A. Yes, sir; it was settled; it was talked over.

Q. Well, you repeated the proposition about three times, I think.

A. Yes, sir.

Q. That was more than you had done before?

Q. I stated it very distinctly, leaving no loop-holes.

Q. And they finally accepted the proposition?

A. Yes; in fact they were ready to accept it when I came,
246 and said so.

Q. You mean when you went to the house?

A. When I went to the house; yes, sir.

Q. What was your purpose, if they had accepted the proposition, in stating it over so many times?

A. As I stated before, to make a distinct and clear understanding. I always try to state my propositions so that everybody understands them.

Q. You had stated as clearly as you could before that?

A. I told you before I had had no conversation with Mrs. Cowley, and that was particularly to explain to her.

Q. And you thought it necessary to explain as many as three times?

A. Yes, sir; in every detail, too.

Q. What did you say about whether you had any plat there?

A. I say I may have had. I am not sure about that.

Q. What is your impression about that?

A. It is possible. I am mixed up on that point.

Q. There were no papers there signed or written, were there?

A. No, sir; none that I know of.

Q. You say it was arranged and so stated at that time that you should go home and prepare a certificate of sale for the 7 and a half acres and a quitclaim deed to be signed by Mr. and Mrs. Cowley, and send the money forward from Tacoma to this city?

A. Yes, sir; except that I don't know as it was stated it was 7 and a half acres. The boundary was distinctly understood, and was perfectly familiar to Mr. and Mrs. Cowley, and she said she understood it fully.

247 Q. The tract you mean afterwards described in the certificate of sale?

A. Yes, sir.

Q. And it was understood, too, that, as I understand you, that these papers and the draft would be sent to Mr. Glover?

A. Yes, sir.

Q. To be delivered by him to either Mr. Cowley or his attorneys, upon the execution by Mr. Cowley and his wife of this quitclaim deed?

A. It was agreed to by them; yes, sir.

Q. That was the method in which the compromise was to be closed up?

A. Yes, sir.

Q. Then you say after that was done it was talked that your attorneys on either side would make disposition of the case in court?

A. Before that the question as to who should pay the costs of the suit came up, and I declared right away that I would pay the costs of the suit.

Q. After these papers should be arranged and the deed delivered to Mr. Glover for the company, and the certificate and money delivered to Mr. Cowley or his attorneys, then, as to the disposition of the case, there was something said to the attorneys?

A. That was left to the attorneys. I simply said that would be settled by the attorneys.

Q. What was said about the method of the disposition of it?

A. I can't remember. That is out of the line of my duties and I didn't pay any attention to it.

Q. What was said about it?

248 A. I don't remember.

Q. You didn't pay much attention to these matters?

A. No; I didn't pay much attention to these matters in detail.

Q. You were perfectly satisfied the attorneys would get the matter out of the way after the deed was delivered?

A. Yes, sir.

Q. You do remember that you said the company would pay the costs?

A. Yes, sir; because it is my duty to remember agreements.

Q. You spoke awhile ago of instructions that were given at the time to the attorneys about the disposition of the case?

A. I gave instructions about the—I beg your pardon—I spoke of instructions given to the attorneys for the preparation of the papers.

Q. What instructions now do you refer to?

A. Preparation of the quitclaim deed and certificate.

Q. And this is the only definite instructions that were given to the attorneys that night?

A. No, sir; their instructions were to close the matter up.

Q. What was said?

A. I said before it was agreed that Mr. Mitchell should act for me, and Judge Hagan for Mr. and Mrs. Cowley.

Q. Now, was there nothing definite said as to how the- should act?

A. I don't remember. I told you before I don't know anything about as to the mode or how to dispose of a case. Instructions were given to Mr. Mitchell to act for me, and Judge Hagan for Mr. and Mrs. Cowley.

Q. You say these papers were prepared at Tacoma and a draft procured for $8,000 and sent to Mr. Glover the next week?

249 A. Yes, sir.

Q. What bank was that draft on?

A. I told you the First National Bank of Portland.

Q. To whom was that draft made payable?

A. Mr. Glover.

Q. How soon afterwards, if at all, did Mr. Glover give you or the company an obligation for that money?

A. I don't know whether he gave me an obligation at all. He simply gave me a receipt that he held the money subject to the order of Mr. and Mrs. Cowley, and had been paid in by the Northern Pacific Railroad Company. It was some time in December, '88; possibly in November.

Q. You sent a letter of instructions?

A. Yes, sir.

Q. And you took no receipt from Mr. Glover for the money till November afterwards?

A. November or December. I was here personally and asked him.

Q. I presume you haven't that receipt or a copy of it with you?

A. No, sir; that is in St. Paul.

Redirect examination by Mr. ASHTON:

Q. Did you receive from Mr. Glover any acknowledgment of the receipt of your letter?

A. I don't remember whether I did.

Q. Or from the bank?

A. I don't remember whether I did. It is very likely I did.

Q. That would very likely have been cared for in your correspondence?

250 A. Yes, sir; probably would have never come to my eye.

Q. Referring to the certificate of sale mentioned by counsel for plaintiff in this cross-examination, I will ask you to look at this paper, Exhibit "H," and signature thereto, and state whether or not you recognize that signature.

A. It is my signature.

Q. In your official capacity?

A. Yes, sir.

Q. It is, is it?

A. Yes, sir.

Witness excused for the present.

NOTE.—Mr. J. M. Ashton requested Mr. Blake to produce a copy of the power of attorney referred to in Judge Albert Hagan's testimony.

Mr. Blake said that neither he nor Mr. Cowley had the same, and therefore could not produce it.

BLAKE: There was a power of attorney at one time.

ASHTON: But that isn't in existence now?

BLAKE: No, sir; as I understand it, it is not in existence.

(Conversation between attorneys continued:)

ASHTON: And not in force?

BLAKE: And not in force, and its terms would not cover anything like the settlement mentioned here.

(End.)

251 FRANK GANAHL, called for defendant, being first duly sworn, testified as follows:

Direct examination by Mr. MITCHELL:

Q. Mr. Ganahl, you were an attorney, practising your profession and residing in this city during the month of May, 1888?

A. Yes, sir.

Q. You were one of the attorneys at that time for Mr. H. T. Cowley, against whom suit was brought by the Northern Pacific Railroad Company about some land in this city?

A. Yes, sir.

Q. You may state what took place, as you remember, as between Mr. Cowley and the railroad company, relative to a settlement, on the 8th day of May, 1888?

A. I don't exactly remember the date, but the record will show. It was some time in May. We were about to prepare to go into the testimony of the case. Mr. Cowley was in my office. We had arranged the order of the testimony, and I think a month or two before that Mr. Cowley had given to Judge Hagan a power of attorney to settle this thing. To this settlement I paid no attention. There was a communication made to me by Mr. Cowley, which necessitated my rushing down to the land office. I returned and met Judge Hagan. He said: These people have made me an offer. I said: I have nothing to do with that. Mr. Cowley has witnesses in my office. I went in and told Mr. Cowley this, and said you had better bring Mrs. Cowley down. He went up and brought her. There were two other parties and another gentleman, whose name I have forgotten. I told them what Judge Hagan had told them—a certain tract of land amounting somewhere in the neighborhood of 7 or 8 acres and a sum of

252 money in cash, $8,000. Mr. Cowley asked me whether I would advise him to take it. I told him I certainly would. Mr. Hagan was in the office during this time. They consulted together—the lady and gentlemen—and said they would like to have a day to consider. This was about 2 o'clock in the afternoon, as I recollect, and Judge Hagan and myself then went into his office, and the statement was then made by you, Mr. Mitchell. You stated then that Mr. Schulze was in town, and that you would like to have them make up their minds by that night. I said, That is for you to decide, and Mr. Cowley then favored that. I had some business over to the Grand. Next morning I found a note on my table that the matter was settled. On Thursday Mr. Cowley came down to my office. Judge Hagan was there and Mr. Glover came over. He had two documents and a small map. The map was about the size of my hand, containing this piece of land. I looked over it. Mr. Cowley stood by me. I did not examine these deeds; I wasn't present at the settlement, but Judge Hagan did. The check was handed over—a check of deposit or certified check of $8,000—and Mr. Hagan made this statement to Mr. Cowley: These deeds are correct and in pursuance of our settlement, are they not, Mr.

Cowley? Mr. Cowley said, They are. The check and papers were left with Mr. Hagan. Thus is the sum and substance of that. The tender of the money and the tender of the money and the map are exactly as I stated it.

Q. State what, if any, authority Judge Hagan had for this settlement of the case.

A. Apart from the general authority of attorney in the case, there was a power of attorney, after the Ritz matter, given by Mr. Cowley, calling for the best terms that he could get.

253 Mr. BURKE: I move to strike from the record that part of the testimony stated by witness regarding the power of attorney.

Q. Who made that power of attorney?

A. Mr. Cowley signed it, I think, and I am not sure Mrs. Cowley signed it. I wrote it or dictated it to my stenographer.

Q. You know why that power of attorney happened to be given?

A. That is a very hard question to answer. I can state this, Mr. Mitchell: During that winter—it was after my return from Lewiston—certain papers were given to Mr. Ritz, that he was to go East and effect some terms, and he went. This power was given by this gentleman to Judge Hagan. I didn't know these railroad people, and at the time of this settlement in this suit that power had never been revoked by Mr. Cowley.

Q. Had you ever seen Mr. Schultze?

A. No, sir; I was extremely anxious to see him and I went down in that real-estate saloon and we took a glass of wine together, and I haven't seen Mr. Schultze since.

Q. When were you informed of the settlement?

A. First intimation I had that this settlement was made was the next morning. Mr. Cowley said the papers and money will be here Thursday; also saw Mr. Cowley on the street. Says I, You have settled your case? He says, Yes. This was prior to the time Mr. Glover came in with the deeds and check.

Q. Where was Mr. Cowley when Mr. Glover came in?

A. Where was he?

Q. Yes.

A. Mr. Cowley was in my office.

Q. Did Mr. Cowley go to see Mr. Schultze that day?

254 A. That I don't know anything about. After Hagan and myself went in and you made this communication—you understand—that it would be a great accommodation to have this settled up because he was to be here quite late in the night, Hagan and I went back and informed Mr. Cowley. Mr. Cowley said he would like to see Mr. Schultze and talk to him privately. I said you can either make up your mind to accept it or not. Whether he went to see Mr. Schultze or not I don't know.

Q. Had there been any offer of settlement through the Ritz proposition?

A. None that I know of.

Q. There were others then present when this proposition was made besides Mr. and Mrs. Cowley?

A. Yes, sir; Mr. Havermale and a preacher; that is my recollection. Mr. Havermale was a large fat man. He is this same gentleman that owns all this——

Q. I understood you to say that you advised Mr. Cowley that this was a fair proposition?

A. Yes, sir; I told him I should take it then and there. Mr. Cowley at that time seemed very much pleased with it.

Cross-examination by Mr. BURKE:

Q. You say that to Mr. Hagan's efforts to compromise the case under this power of attorney given you paid but little if any attention?

A. I did none, sir. At that time he had gone into partnership with Mr. Hyde, and he and I had a mass of unfinished business in the mines.

Q. About when was that power of attorney given?

A. After the return of Mr. Ritz; some time in the latter part
255 of January or early part of February. However, I will find the power and let it speak for itself.

Q. You think you have it without doubt?

A. Yes, sir; Mr. Cowley has a copy.

Q. You say you met Hagan somewhere and he told you the company had made a proposition?

A. Yes, sir; I met him on the landing of the stairs

Q. What time in the day was that?

A. About 2 o'clock in the afternoon.

Q. You say Mr. Cowley and these witnesses were then in your office?

A. At the time I met him on the landing?

Q. Yes, sir.

A. I suppose they must have been. I found Mr. Cowley and told him to go get Mrs. Cowley. He asked me the terms, &c., and I told him I preferred Mrs. Cowley would be present.

Q. Did Mr. Cowley then leave the office and go and get Mrs. Cowley?

A. Yes, sir.

Q. And how long was it till he and she came back?

A. A short time.

Q. Then the proposition was stated over to them?

A. Then Mr. Hagan came in and stated the proposition.

Q. Your remembrance is that it was on Thursday afterwards these papers were brought over by Mr. Glover?

A. Yes, sir; in the morning, about 10 o'clock. I think it was Thursday. It is a long time ago, and dates are a very peculiar thing to remember.

Q. Who was in the office when Mr. Glover came in?

A. Mr. Cowley, Mr. Hagan, and myself.

Q. Do you not remember the occasion of Mr. Cowley's
256 being there? Had you heard the papers had come?

A. Mr. Cowley understood that the papers were to be there, I understand, by appointment made at his house.

Q. Prior to that time, however, you understood that Mr. Cowley would not accept those papers?

A. I don't know. The only conversation I had with Mr. Cowley was at the foot of the stairs. I had seen him at the time this proposition was made.

Q. You say you hadn't seen him from that time?

A. No; I say I hadn't seen him prior to that time; since the day before, when he requested to have a day to consider it. The next I saw of Mr. Cowley was this Thursday morning when Mr. Glover brought the papers in.

Q. Had you and Cowley and Hagan any conversation about the case before Glover came in?

A. No, sir; none to my recollection.

Q. Do you remember how long Cowley had been there before Glover came in?

A. No; I don't know. Cowley was in there when Glover came in. I supposed the case was settled.

Q. Glover turned these papers over to him?

A. Hagan.

Q. Did you see the papers and examine them?

A. I didn't, except this map.

Q. There were two deeds—one a quitclaim deed and the other a contract for deed of this 7 and a half acres—made out, and this little map was sent accompanying the deed?

A. Hagan read the deed over; I didn't. He says to Mr. Cowley: This is in pursuance of our settlement, is it not? And Cowley said
it was. Hagan said: This deed tallies to the map; the
257 papers are all right.

Q. What else was said?

A. Nothing.

Q. Was there anything said about execution of the deed?

A. No, sir; the money was there—$8,000.

Q. What shape was it in?

A. A deposit here upon this bank.

Q. Did you see the paper representing the money?

A. I saw, sir, that which Mr. Glover handed over—a certificate of deposit—which I would have taken from that bank as so much money.

Q. What was done with that check or draft?

A. It was left there with Mr. Hagan.

Q. What did he do with it?

A. I can't tell.

Q. Don't you know he took it off?

A. No; I don't. That part of it Mr. Hagan attended to.

Q. You say there was nothing said there about tendering the money?

A. I don't know if there was anything said about when the draft should be delivered to Mr. Cowley or the money.

Q. As soon as he seen these papers, what did Cowley say to that?

A. Cowley said he would like to wrestle with it a little longer.

Q. You say Cowley said he would like to wrestle with it a little longer?

A. I think he used that expression.

Q. Who went out first, Glover or Cowley?

A. I think Cowley.

Q. Was there any arrangement as to when he was to be back?

A. None that I know of.

258 Q. Did he refuse to execute the deed then and there?

A. No, sir.

Q. Did you see him afterwards in regard to the matter?

A. Yes, sir.

Q. You seen him afterwards?

A. That day, I think, or next day.

Q. Did he refuse afterwards to sign the deed?

A. No, sir; positively no. He came back and wanted his papers. I told him I was as much interested in those papers as he was. He borrowed them at 2 o'clock and never brought them back.

Q. You say you don't know whether the check or draft of deposit or whatever it was was left with Hagan or not?

A. No, sir; I don't know. I think, possible, Mr. Glover may have taken it back with him.

Q. Do you know to whom that instrument or whatever it was was made payable?

A. Payable to the order of Cowley, as I understood it.

Q. Are you pretty sure it was? Did you see it?

A. No, sir; I don't know. I told you three times I wasn't positive.

Q. Then you don't know, as a matter of personal knowledge, to whom the check was payable?

A. No, sir; I don't. I know the money was payable to his order. That is what I do know. I will swear to that.

259 Mr. J. H. MITCHELL, JR., called for defendant, being first duly sworn, testified as follows:

Direct examination by Mr. MITCHELL:

A. I was during the month of May, 1888, as I have been for the last 6 or 7 years, attorney for the Northern Pacific railroad. At that time I was attorney having charge of this case, of the case of The Northern Pacific Railroad Company against H. T. Cowley, and was the only authorized attorney in the Territory at that time to act in this case. Mr. McKnott had been up to July, '87, the Sr. counsel for the railroad company in the Territory, but had removed at that time to St. Paul as counsel to the company. There had been a great many postponements in the case, the particular reason being that Mr. McKnott had had charge of the case before leaving the Territory and was more familiar with it than I was; in fact, I

was not familiar with it at all. After he left I had to pick it up and look after the matter and had occasion to, in the first place, get it referred to a referee for taking testimony. Afterwards it was referred to the district court about the time the testimony was taken in it. Judges Hagan and Ganahl having business in the mines and a great deal of time was taken up by my additional increase of business, owing to Mr. Naught's having left the Territory. During all this time Judge Hagan was insisting upon trial of the case and was notifying me that he would not be subjected to any further delays, and that the case was set upon by the referee for May 10th, 1888, and there would be no further delay, as he proposed to go on with the case. At that time Mr. Schultze was general land agent for this Territory, Oregon, and Idaho.
260 He had left the Territory on about the 4th of December previous. I had been expecting him back. He did not return till this 10th day of May. I had notified him what time this case was set and notified him I would meet him here. As soon as I saw Mr. Schultze that morning, or previous to that time, I had advised him that I thought it would be wise for Mr. Schultze while in New York to obtain consent from the board of directors to have this case settled and have them designate the amount they would authorize him to pay, and advised him that it would be the proper thing to have them do. Upon arrival he notified me that he had gotten such authority from the board of directors. Mr. Schultze was here with full authority within the limits which they had authorized. As soon as he mentioned this to me he also named the amount which they would pay, which was $15,000. That offer was without regard to any land being retained by Mr. Cowley. Mr. Schultze said, however, he was authorized to make any such propositions of the land—the land and money in such proportions as he thought proper. He said that while he was authorized to pay $15,000 he felt that Mr. Cowley should have transferred to him as a part of that consideration the land on which set his home, and that he thought that would be the better way. Mr. Schultze then suggested that I see Mr. Hagan and notify him of this; so I went and notified Judge Hagan. In the first place, — asked him if he had any offers to make. He didn't make any offers; I am satisfied of that. I think—my impression is Judge Hagan—I wanted him to go over in Newberry's office and meet Mr. Schultze. I know when he did meet Mr. Schultze the first time that day some-
261 thing was spoken about the terms. Mr. Schultze said the matter was in my hands, and that I would be authorized to make him a distinct proposition. At that Judge Hagan went out, I think, and Mr. Schultze said: We had better—I think, we had better offer these people what will amount in land and money to the amount of about $12,000. I said to him: I don't think that is advisable. I says: Let's name to them the maximum amount the board of directors have authorized us to pay. Let's pay in land and money as you suggest, and tell them at once this is all we can do, and if they don't want to accept that we will go on with the trial. I advised him to name the highest sum we were authorized to pay,

and after he thought over it a little while he consented. I said to Judge Hagan nothing, I think, about what we were authorized to do. I did say this to him when I next met him at the office: That I didn't believe in naming the sum and then jewing people: that while I might have intimated to him before that a sum less than this proposition of $15,000—money and land—cash $8,000 and the land on which the home were situated, I remember distinctly at the time why I may have offered such. I didn't believe there was any use offering those people any other sum, because I felt if we were to make an offer less than that amount and they were not satisfied with it, there would be so much time lost in renewing offers and getting up to the amount. I think that was about all the conversation I had with Judge Hagan. I don't think I met Mr. Cowley. I was informed afterwards that Mr. Cowley had gone to Mr. Newberry's office to meet Mr. Schultze. Afterwards, in pursuance of that meeting, Mr. Schultze came to me, but I wouldn't undertake to say what conversation was taken place there. I understood afterwards
that Mrs. Cowley had been sent for. When the time
262 for the case was called in the afternoon I was informed that
they were considering the proposition. Mr. Cowley had gone up for his wife. I was informed this by Judge Hagan—that Mr. Cowley had gone for Mrs. Cowley, and that they wanted to wait till she came down. That was, I think, before the time appointed for the testimony in the afternoon. They wanted further time, and the matter of the taking of the testimony was postponed till the next day. I said, Mr. Schultze had just arrived from New York, and if he were delayed catching that night's train it would delay him on the trip. If we were not notified of their acceptance of the proposition before train time we didn't propose going out: if we were notified and the matter could be adjusted, we would leave that night. They considered the matter all that afternoon. In the evening, when Mr. Schultze and I went down to the car—the car was on the side track at the yards—in the afternoon I was of the impression from all I had gathered up town, I was of the impression that he was agreeable, although I don't think I had any talk with Mr. Cowley himself. I think I passed him once or twice without speaking, on the street. That evening, I think about half past 8 o'clock—it may have been as late as 9 o'clock—while I was at the car, Mr. Hagan called with a carriage and said Mr. Cowley was waiting at the hotel: that he was agreeable to the proposition, willing to accept it, but Mrs. Cowley wanted to see Mr. Schultze and talk a little more about details, and that he would like to have him come to the house where she was. Mr. Schultze insisted upon my going along, as in the event everything proved satisfactory I would have to draw up the papers, which would have to be signed, and it
would be necessary for me to know the arrangements from
263 the parties themselves. I refused to go unless Judge Hagan
would go along, as I said at the time to Judge Hagan, in the presence of Mr. Schultze, that I was averse to attorneys going to clients of opposite counsel to make adjustments with them, and upon that Judge Hagan consented to go along. We went up to the

Windsor hotel, got Mr. Cowley in the carriage, and went to the house. There we found Mrs. Cowley and the children. Whether they were all in the room during the time this conversation was going on I don't know. I know some of them went out. Mr. and Mrs. Cowley carried on the conversation mostly concerning this agreement. The details for the right of way for water pipe across the 7 and a half acres was discussed thoroughly, and Mr. and Mrs. Cowley consented to give such right of way. Mrs. Cowley then spoke of some church lots—some lots she would like to have for the church. Mr. Schultze then remarked he was not authorized by the company to do anything with that; if anything was done in regard to that it would have to be outside, and not to be considered a part of the case, but he said he would do this: he would buy the lots from the railroad company outside of any land reserved for railroad purposes—such land as the company might sue—that he would buy and pay for these lots, and he named the sum he would pay for them; that he would deed them to any person or corporation Mrs. Cowley would designate. I think she designated her husband as the person whom she wanted. Mr. Schultze distinctly stated at the time that that was a matter of his own. Of course, there were a good many little expressions used at the time. He said he presumed he had never given as much to the church as he ought to, and he would be glad to give this. That was all acceptable to Mr. and Mrs. Cowley, with the
264 knowledge that it was to be no part of the compromise.

Mr. Schultze was very particular about stating it was a personal matter between him and the company, and not a matter between Cowley and the company at all. The matter of pasturage was all talked over. It was understood by Mr. and Mrs. Cowley, as stated by Mr. Schultze, that this land reserved by the company out of this tract, other than the 7 and a half acres, that land was to be platted into an addition by the railroad Co. Mr. Schultze said then he would be ready to plat it; till *that* time he should have use of it, and as little interference as possible would be made. Mr. Schultze also said to Mr. Cowley at the time that he was going to stop at Yakima—the 10th, I believe, was Thursday, if I am not mistaken—and we left on Thursday night, and Mr. Schultze went off at Yakima and I went on to Tacoma and arrived there Saturday morning, Mr. Schultze Sunday morning, after remaining at Yakima. Mr. Schultze informed Mr. Cowley that owing to his having to stop one day at Yakima he would not mail papers before Tuesday morning; that he would only have one business day at home between the time of leaving here and Tuesday. On Monday these papers were prepared, partly in my office and partly in Mr. Schultze's office. They were sent on Tuesday morning so as to arrive here—that is, they were prepared Monday and mailed Tuesday, I believe. They went so as to arrive here on the day we had informed Mr. Cowley they would arrive. I think that was either Wednesday or Thursday; I am not sure. It was arranged that they should be here on the 16th, whatever day that was, and they were here at that time. I think that was Wednesday, the 16th, that they were

to be here. The matter of the day when they were to be
265 forwarded from Tacoma and the matter of the day they were to arrive here were all duly talked over at Mr. Cowley's house that night. I don't think there was any conversation between Mr. and Mrs. Cowley and Judge Hagan, except when some little matter of detail as to the best method of arrangement came up; but the final arrangement as finally concluded that night included the adjustment of all of these matters, so that everything that had been canvassed during the evening was finally settled before we left there. Every matter upon which there had been an inquiry made was fully included in the final arrangements. There was nothing left to be passed upon at all. Mr. Schultze discussed with Mr. and Mrs. Cowley the boundaries of the tract of the seven and a half acres. Both Mr. and Mrs. Cowley spoke of it in a way that indicated that they were as well informed on the subject as Mr. Schultze himself. They referred to a map that they had examined at a time when something was said by Mr. Cowley to Mr. Schultze as to a settlement of this case. That map was referred to and Mr. Cowley expressed himself as being familiar with the lines as he saw on the map at that time. The distances were outlined in the conversation between Mr. and Mrs. Cowley and Mr. Schultze by reference to streets, &c. I will say this, that both Mr. and Mrs. Cowley spoke both of the relative boundaries. Of course, I can't remember all that was said there. They spoke of it, and whenever Mr. Schultze addressed himself to that subject they coincided with him. Mr. Schultze said he would execute for them a certificate of purchase, such as he gave to all purchasers; not a preliminary contract, but considered this as a cash purchase, and he would give them the cash certificate, which would entitle them to a deed, and
which by its terms would protect them from the time of its
266 execution; that as soon as a duplicate of that certificate could be forwarded to New York a deed would be issued, and said he named the time when these deeds usually get around. The question then came up as to who should pay the costs of the case. I answered at once—whether any inquiry was made to me or not I don't know, but it is my impression simply the matter of costs being mentioned, I said at once: We are the plaintiffs in this action; we brought the suit; we are responsible for bringing it, and we will pay the costs; and I think Mr. Schultze said: Yes, that is correct. I think I was the one who spoke of it; that is my impression. In the course of the talk about details, the question came up how this matter should be fixed up and the case disposed of. Mr. Schultze said this is a matter of the attorneys, and that I was authorized for the company to act with Messrs. Ganahl & Hagan, and prepare such papers as would dispose of the case and get it out of the way. I said that inasmuch as the case has been settled by agreement of the parties, and it was necessary to return home that night, I would not have an opportunity to draw such papers, and suggested to him that he should form a memorandum of the terms of the agreement as a basis of a stipulation to be entered into when I returned to court and I would sign it. It wasn't

agreed that the case should be dismissed. I don't think there was anything said about dismissing the case, but the talk was as to its final disposition. It was not practicable to file a stipulation for its dismissal, as it was a suit in ejectment, where the defense was in the nature of a counter-claim upon which several thousand dollars were asked by Mr. Cowley as damages, and I wished the record to show that all the controversies in that case were disposed of,

267 so that — might not be any possible chance of subsequent trouble in relation to this land. Upon my arrival home I had these maps prepared for consultation with Mr. Schultze; had designated on them the distance from the boundary line of the tract to the seven and a fraction of acres—the distances respectively of each of the lines—and from that and other data in Mr. Schultze's office I made up the description contained in the certificate and in the deed. I identify this as the map from which I took this description and the maps which were forwarded with Mr. Schultze's letters, and I identify this quitclaim deed and this certificate of sale as the papers which were drawn by me and as being in the same condition as they were when they left my hands to be forwarded to Mr. Glover, of this city, of the First National bank; they are both of my handwriting. In the conversation at the house Mr. Schultze said that the papers and money, $8,000, would be sent to the First National bank, and that letter of instruction would be written to Mr. Glover for delivery of the papers to Mr. Cowley, and have payment of the money upon Mr. Cowley's order. I think the draft was made payable to Mr. Cowley's order; of that I would not be sure. However, at any rate, it is still in the bank, so far as I know. It has always been my advice to the company to let it remain there subject to Mr. Cowley's order. I remember it was distinctly understood at the time that the papers should pass through the hands of the attorneys to Mr. Cowley. I had been informed and understood that Messrs. Ganahl & Hagan, at least Judge Hagan, had full authority to make settlement of this case—had full authority to make any settlement they might think proper in the case. I never learned anything different from Mr. Cowley.

268 The contents of these papers are in exact pursuance of the terms of agreement as arranged with client. We were notified by the bank of their receipt here upon the day that they were received, on the same day Mr. Schultze had arranged by agreement for them to be.

Cross-examination by Mr. BLAKE:

Q. I will call your attention to Exhibit "E," that has already been offered in evidence, purporting to be a letter from Mr. Cowley to yourself of May 17th, 1888——

Mr. MITCHELL: I object to the above question for the reason it is irrelevant, incompetent, and not proper cross-examination.

REFEREE: I reserve my decision.

—(continuing) and ask you whether you didn't receive that letter prior to the 19th day of May, '88?

A. I received it along about that time, I think.

Q. Ask you if you did not write a letter in answer to that letter yourself, being dated May 19th, '88?

Mr. MITCHELL: I object to the last question for the reason it is irrelevant, incompetent, and not proper cross-examination.

REFEREE: I reserve my decision.

A. I did, sir.

Q. I will ask you, now, after refreshing your recollection by these letters, as to whether you were not notified by Mr. Cowley that Messrs. Ganahl & Hagan had no authority to act for him in
269 the matter of the compromise of this case prior to May 21st, '88?

Mr. MITCHELL: I object to the last question for the reason it is irrelevant, incompetent, and not proper cross-examination.

REFEREE: I reserve my decision.

A. As to whether I was notified of that fact by receipt of that letter the contents of the letter will determine that; but I will say that I was not in any way notified prior to the 21st of May, nor have I been at any time since that time—at any time up to the present time—nor even now notified that they had no authority to make a compromise, inasmuch as the compromise had already been made.

Q. You wrote this letter that I have referred to?

A. Yes, sir.

Q. What did you understand by this language in that letter: "I hereby notify you that your recent proposition of compromise in the case of the N. P. R. R. Company against me has not been accepted; that Messrs. Ganahl & Hagan have been discharged by me from any further connection with the case and are not authorized to represent me, and that any further communication you may desire in this matter should be through my duly employed attorneys, Messrs. Blake & Ridpath, of this city." Didn't you understand that that meant that they had no power or authority to enter into or complete any compromise of that case?

Mr. MITCHELL: I object to the last question for the reason it
270 is irrelevant, incompetent, and not proper cross-examination.

REFEREE: I reserve my decision.

A. I understood nothing of the kind, for I considered the case settled by agreement of the parties—the compromise fully passed upon and acquiesced in by both sides—and whatever was done or to be done was simply to be done in obeyance to both the legal and moral obligations. What I did understand by the part you have read from that letter was that Mr. Cowley was evidently being badly advised by some one not authorized to act for him in that case; that he was attempting to do something that, so far as I was concerned, he could not do under the law in the way he was attempting it, and that therefore I could not recognize his action in the matter.

Q. Was that letter received by you before or after you sent the telegram to Mr. Cowley dated May 18th, '88? In response to the telegram he had sent, you say — could not take testimony on May 21st.

Mr. MITCHELL: I object to the last question for the reason it is irrelevant, incompetent, and not proper cross-examination.

REFEREE: I reserve my decision.

A. That I can't say. I think the letter was received after I received the telegram; not sure, however

Q. If the telegram was sent before the letter was received it was only a very short time, was it?

A. It was not more than a matter of a day. I can only judge from that date upon the letter.

Q. At the time you sent that telegram you considered that the case was going forward before the referee for trial?

271 A. No, sir; I did not. I considered it would go forward in pursuance of the agreement, and that whatever was to be done was to be done under that agreement, and when they said fight in there I considered the best way to fight Mr. Cowley was with his own agreement, and consider so yet.

Q. What agreement do you refer to?

A. Agreement made between him and Mr. Schultze at his house and arrangement for the disposition of that case.

Q. If you considered that the case would not go on before the referee at the time you sent this telegram, what did you mean by the following language in that telegram: Mr. Schultze, my principal witness, depending on your word, since broken, has made engagements making it impossible for him to come to Spokane Falls in this case for several weeks; will not go on till he can go. This you can depend on. If you must have a fight you shall have it.

Mr. MITCHELL: I object to the last question for the reason it is irrelevant, incompetent, and not proper cross-examination.

REFEREE: I reserve my decision.

A. I meant just what I said in the telegram. Of course I didn't know what had been hatched up here in Spokane Falls by designing parties to interfere with matters that didn't concern them, and I was going to, if possible, cover ever possible contingency. Mr. Schultze never authorized me to take any definite action than what I did in the case, and his directions to me were at all times, "See that that agreement is complied with." I will state this also: That after that stipulation was filed and decree entered I was will-

272 ing to go into court and have the stipulation set aside, as also the judgment, and asked Mr. Schultze for authority to do so, but he declined to allow it to be interfered with; said the agreement was made and he wasn't going back on it.

Q. You say there was no agreement at the house that night that the case should be dismissed?

A. No, sir; there was not.

Q. It was agreed, however, that when these papers, the quitclaim deed, should be executed and it and the certificate of sale should be

delivered to the respective parties that the money should be paid over; that was the understanding, was it?

A. Yes, sir. In that connection I will say that when Mr. Schultze said that the matter of the disposition of the case in court was a matter to be left to the attorneys, as they were more familiar with it than the parties could possibly be, I turned to Judge Hagan and discussed with him as to what should be contained in the stipulation. That was talked over that night. The conversation between Judge Hagan and myself was in their hearing, as they were sitting where they could hear it, and the stipulation as filed contained the contents as talked over by Judge Hagan and myself at that time.

Q. You don't pretend to say that conversation was heard by Mr. and Mrs. Cowley?

A. I think they did.

Q. Just tell what was said, if you please, between Judge Hagan and yourself.

A. I think I said to him that the case should be settled, and that he and Judge Ganahl, on behalf of Mr. and Mrs. Cowley, should draw up a stipulation embodying the terms of the agreement
273 as had been talked over by both parties; the only additional talk was that the settlement had been made. It wasn't as a part of the settlement agreed upon between the parties, for the disposition of the case in court was with the judge and court officials. A verbal stipulation might not be looked upon as favorable by the judge and he preferred that such stipulation be filed in accordance with the practice of the court.

Q. Did you consider that, as the attorney for the company—did you consider that it was essential that such a stipulation should be filed and such a judgment rendered without the execution and delivery of this quitclaim deed?

A. I didn't think it absolutely essential, but something which I always do, so that the courts could know that the case is disposed of.

Q. What was in the way, in your judgment, of your entering into a stipulation with counsel simply dismissing the case?

A. I don't know that anything was in the way except that the case couldn't be very well dismissed and leave a perfect record in court without some determination by the court authorizing something definite in the matter of this Cowley claim.

Q. I will ask you if this is not a fact, Mr. Mitchell, that on that night, there at Mr. Cowley's house, it wasn't thoroughly understood by all parties that this proposed compromise should be fully carried out by the execution of this quitclaim deed by Mr. Cowley and wife and the execution of certificate of sale by the railroad company to Mr. Cowley and the payment to him of this $8,000?

A. I considered the compromise as already made and perfected at the house. I consider that if a verbal agreement was sufficient for Mr. Cowley to base his defense upon, a verbal agreement
274 was certainly sufficient to settle and dispose of that same action. I think I can satisfactorily answer that question by saying the compromise was practically carried out that night.

Q. Didn't you understand there that night that the papers by which the agreement was to be carried out were a quitclaim deed on the part of Mr. Cowley and wife to the railroad company and a certificate of sale on the part of the railroad company to Mr. Cowley?

A. I didn't consider the quitclaim deed or the certificate of purchase as any more fully carrying out the agreement than what had been done there that night, but regarded them as being spoken of, as they were, as a more convenient and ready method of conveyance. I don't consider them as fully carrying out that agreement, or in anywise carrying out that agreement, but a mere matter of convenience and ready conveyance of it. I will say this also, that I don't think that the matter of the execution of the quitclaim deed was mentioned there that night as a method of carrying — the agreement made at all. The agreement was that Mr. Cowley was to relinquish all his right in and to the balance of the land not included in the 7 and a fraction acres of ground, but I do remember the company was to execute a certificate of purchase to Mr. Cowley, and that was agreed upon. I will say this, further, that I consider the agreement as made there that night as one of which specific performance could be enforced in the courts and rely more upon that than upon any documents executed or to be executed. There was nothing further to be done necessarily.

Q. What was said there that night about boundaries, and who said it?

A. I think Mrs. Cowley herself spoke of the boundaries.

275 Q. What did she say?

A. She said, in substance, just what she said in her testimony here.

Q. What did she say, according to your recollection?

A. I can't remember all she said about those boundaries.

Q. Can't you remember anything she said about those boundaries?

A. I know she spoke of them with reference to 6th street.

Q. What else was mentioned with reference to them?

A. She mentioned a certain fence.

Q. Can't you make it any more definite than that?

A. No; I am not familiar with those boundaries, but I know from the way she mentioned them she knew a good deal more about it than I did, and I was fully impressed with that fact when I heard her testimony.

Q. Can't you tell anything more definite of what she said about boundaries than what you have done?

A. No; no more than what she said at the time.

Q. Can't you tell anything that anybody else said in that conversation about boundaries?

A. No; I don't know that I can, definitely; I know Mr. Schultze outlined them particularly.

Q. What did he say?

A. I know he said that the land to be conveyed by the agreement to Mr. Cowley was to be within a tract including a little more

than 7 acres. He located that with reference, in the first place, to the boundary lines of Mr. Cowley's homestead claim; also with reference to a platted portion of land, platted into blocks, but I think not into lots, and I remember distinctly that blocks 90 and 99 of that platted portion were referred to.

Q. There was no map present at that time?

276 A. I think not; but reference was made to a map which was used previously, and Mr. and Mrs. Cowley both said they remembered that map and the lay of the land.

Q. There was no paper containing any description of the land of any sort present, was there, at that time to refer to?

A. I don't remember whether there was or not. There may have been, but I think from what they all said I concluded that they were familiar enough with the matter without a map.

Q. Are you able to describe the boundaries of his homestead?

A. No, I am not. I have always understood that the homestead was about half upon this railroad tract—at least, this is all he has always claimed.

Q. Did you see that draft that was sent up here to Mr. Glover?

A. I think not.

Q. You don't know, then, who it was made payable to—from a matter of personal knowledge?

A. No; I don't. I saw Mr. Schultze's letter of instruction which was used in evidence in this case.

Redirect examination by Mr. MITCHELL:

I wish to state that when I reduced the stipulation to writing I took it from a stipulation which had been prepared by Judge Hagan. There was something in the stipulation which he had prepared, some little technical matter which wasn't in the usual form to which I was accustomed, concerning the payment of the costs and this counter-claim. I thought there should be something in this stipulation concerning them, so as to dispose of it and make the record clear. He having used most of the page on

277 which the stipulation was written, I concluded to rewrite it and insert this. I remember that distinctly as to the matter of costs and, I think, as to the matter of the counter-claim.

Q. When did you write that stipulation?

A. I wrote it the first day after I arrived here.

Q. That was the first day of court?

A. I think it was.

Q. Do you remember whether it was May 21st?

Q. If court opened that day, it was.

Q. You wrote it the day when you were in court?

A. Yes, sir.

Q. Did you write the satisfaction of the stipulation in judgment?

A. I did.

Q. What time in the day did you file this?

A. I don't remember whether it was the forenoon or afternoon. I know I presented that to the court and asked for judgment.

Q. You knew at that time you had been notified that the taking

of testimony in the case would be proceeded with before the referee on the afternoon of the 21st, didn't you?

Mr. MITCHELL: I object.

A. I don't remember of receiving any such notice, particularly for that day—that afternoon.

Q. You understood it had been contemplated by the parties and the referee that the taking of the testimony before the referee should go forward on that day—Monday, May 21st?

A. No; I didn't understand it so.

Q. What did you understand would be done before the referee that afternoon?

278 A. So far as I was concerned, I didn't understand anything would be done that afternoon. I think it had been taken out of the hands of the referee. The case had been referred to the referee, and a stipulation of the parties was the only way to get it back into court.

Q. Did you know that the case should go forward?

A. No, sir; hadn't the least idea that the taking of testimony would proceed that day.

Q. Didn't you know that the case was set for hearing before the referee on that day at the time you filed that stipulation?

A. No; I did not, because there was no effort made to bring it to my hearing.

Q. Didn't you receive a written notice from the referee that the taking of testimony would proceed on that day prior to that time?

Mr. MITCHELL: I object on the ground that the last question is immaterial and irrelevant and not proper cross-examination.

REFEREE: I prefer to not rule on that question.

A. Such a notice may have been received at our office; I am not sure.

Q. I will call your attention again to your telegram of May 18th to Mr. Cowley, in which you say, "Never arranged for taking of testimony on Monday or any time subsequent to May 10th." What did you have reference to when you wired that to Mr. Cowley?

Mr. MITCHELL: I object to the last question for the reason it is immaterial and irrelevant and not proper cross-examination.

279 REFEREE: I prefer not to rule on that question.

A. If you will refer to your exhibits you will find that that is in response to a telegram. I had no knowledge at the time I sent that telegram that any arrangements whatever had been made for the taking of testimony before any referee. If any notice was received, either by myself or at my office, it was subsequent to the sending of that telegram. I had no knowledge whatever on the subject.

Q. Didn't you know at the time you wrote and filed that stipulation that there were negotiations pending between Mr. Cowley and Messrs. Ganahl & Hagan for their retirement from the case and for the settlement of their fee?

Mr. MITCHELL: I object to the last question for the reason it is immaterial, irrelevant, and not proper cross-examination.

REFEREE: I prefer not to rule.

A. I knew Mr. Cowley was trying to get rid of his attorneys, but not in a way which I could take any notice of, and I so notified him. What their negotiations were I don't know; they were private matters between Mr. Cowley and his attorneys.

Q. You knew, however, that there were such propositions passing between them?

Mr. MITCHELL: I object to the last question on the ground that it is immaterial, irrelevant, and not proper cross-examination.

REFEREE: I prefer not to rule on this objection also.

280 A. I knew they were having some difficulty about Hagan & Ganahl's fees, and rather than pay what they charged or had contracted for Mr. Cowley would get rid of them as he could.

Furthermore witness sayeth not.

281 Mr. J. N. GLOVER, called for defendant, testified as follows:

Direct examination by Mr. ASHTON:

Q. You live in Spokane Falls, Mr. Glover?
A. Yes, sir.
Q. How long have you resided here?
A. 16 years the 19th of August.
Q. What business are you engaged in?
A. Banking.
Q. How much time have you been in business?
A. In the banking business?
Q. Yes, sir.
A. Since December, 1882.
Q. In this city?
A. Yes, sir.
Q. Have you had occasion to handle or deal in real estate in this city or surrounding this city in connection with your business or otherwise?
A. Yes, sir; I have had occasion to deal in it a good deal since I have been here.
Q. Have you been familiar with the value of real estate in and about this city since the year 1882?
A. Well, I think I have been quite familiar with it; been selling more or less; been buying and selling continously; don't think there has been a year that I haven't bought more or less.
Q. Do you know the property in this city where Mr. H. T. Cowley resides?
A. Yes, sir.

Q. Did you know that property on the 10th day of May, '88?
282 A. Yes, sir.

Q. State, from your knowledge as to the values of property in and about this city and your experience, what was the reason-

able value of that property in this city on the 10th day of May, 1888.

A. What was the reasonable value of the property where he lives—per acre or how?

Q. Per acre.

A. You mean where his house stands, on——

Q. Well, I will say the 7 and a half acres of land on which his house stands and land immediately adjoining his house.

A. A little over a year ago?

Q. Yes, sir.

A. Well, it was worth at the least calculation $1,000 per acre. I would have paid it for it very quick.

Q. You regard that, then, as a very conservative estimate of it at that time?

A. Yes, sir. I have generally been considered very conservative on my values of property around Spokane.

Q. What bank are you conducting here now?

A. The First National.

Q. And your position in connection with that bank is——

A. Am president of that bank.

Furthermore witness sayeth not.

283 Mr. GEO. H. LEONARD, being first duly sworn and called for the defendant, testified as follows:

Direct examination by Mr. ASHTON:

Q. Mr. Leonard, your residence is in the city of Spokane Falls?

A. Yes, sir.

Q. How long have you lived here?

A. Three years.

Q. What business are you connected with here?

A. Real-estate business.

Q. How long have you been following that business?

A. Ever since I came.

Q. What has been the extent of your business in that line?

Mr. BLAKE: We admit this gentleman as being fully qualified.

Q. Are you familiar with the location of the residence of Mr. Cowley, the plaintiff in this action?

A. Yes, sir.

Q. Were you familiar with that location in May, 1888?

A. Yes, sir.

Q. What, in your judgment, is the reasonable value of 7 and a half acres of land, including the land upon which his house is located and lands immediately adjoining that location? State the value per acre.

A. At the present time?

Q. No; in the month of May, 1888.

A. $2,000 per acre.

Cross-examination by Mr. BLAKE:

Q. What is it worth now?

A. It is worth about twice that now.

284 Q. Property generally in this city has advanced about 100 per cent. in this time?

A. Property in that location has doubled.

Q. You know the property immediately east of the property you speak of?

Q. Well, tell me what it is known as?

Q. It is known as a part of the homestead of Mr. Cowley.

A. Well, I know all that property over there.

Q. You understand that Mr. Cowley's house stands upon a line between this disputed land and the homestead?

A. Yes, sir.

Q. And his homestead lays to the east of the house?

A. Yes, sir.

Q, And the 20 acres—well, the 40 immediately east, what do you say that is worth?

A. Well, it isn't so valuable as the disputed tract. As I recollect, it is lower. There is a portion there that is a kind of a dish. I get my information from prices that we have been offered along the hill west of the tract and property we have dealt in there.

Q. The land that you speak of and upon which you have given an estimate is the land immediately west of his house?

A. Yes, sir.

Q. Now, then, the 40 immediately east of the house, I want to get your idea what that is worth or was last May?

A. It is worth 25 per cent. as much as the disputed tract.

Q. Is there that much difference between the two?

A. I should think there would be; yes, sir.

Q. I will ask you if you don't know that within the last month the east 20 of the 40 I have spoken of has sold for about

285 $1,500?

A. I saw it so reported in the paper; yes, sir.

Q. Then, if that property has advanced 100 per cent., that was worth it, if it has sold at $1,500?

A. Well, property in this town has generally brought about its value.

Q. Well, it is hard to tell about that?

A. That has been the general opinion.

Q. You understand that this land in dispute consists of 120 acres?

A. About that amount.

Q. And you understand that this house and the land that you have particularly spoken of is on the south 40?

A. Yes, sir.

Q. Now, then, I will get you to tell the court—suppose that the house and this land is upon the south 40, what was the balance of that tract worth last May, on an average?

A. Well, I put the price—where does the 7 and a half acres come in?

Q. I am supposing the 7 and a half acres are on the south 40.

A. Some is worth more than that 7 and a half acres.

Q. Isn't nearly all of that worth more?

A. Well, yes, sir; I think that it is.

Q. It is much nearer town?

A. Yes, sir.

Q. And it is better soil?

A. The soil don't cut much figure.

Q. You think it is too valuable to farm?

A. Yes, sir.

286 Q. What do you say as to this 7 and a half acres being worth on an average, as to what the whole tract was worth last May?

A. If anything, under the average.

Redirect examination by Mr. ASHTON:

Q. In speaking of this 7 and a half acres I referred to the 7 and a half acres immediately surrounding Mr. Cowley's house.

A. Yes, sir.

Q. You so understood me?

A. I didn't know what you meant. I so understand you now.

Furthermore witness sayeth not.

287 Mr. KNOX JOHNSTON, called for defendant, being first duly sworn, testified as follows:

Direct examination by Mr. ASHTON:

Q. State your residence and occupation.

A. My residence is right back of Mr. Cowley's, on the hill. I am in the real-estate business here.

Q. How long have you resided here?

A. I have been living in our house more than a month and have been doing business here since the fall of '84.

Q. Your home is here?

A. No, sir; home in Sprague, but doing business here for the last 5 years.

Q. Real-estate business?

A. Yes, sir.

Q. You have had occasion to become acquainted with the real-estate business here?

A. Yes, sir.

Q. Do you know Mr. Cowley and where he resides?

A. I do.

Q. Do you know where he resided in May, 1888?

A. I do.

Q. Were you at that time and are you now familiar with the property at and about his house?

A. I think so.

Q. State your opinion as to the reasonable value of 7 and a half acres of land where Mr. Cowley's house was then and is now located, in this city, on the 10th day of May, 1888.

A. I should say $1,500 to $2,000. I don't think $2,000 is out of the way.

Q. Per acre?

A. Per acre.

288 Cross-examination by Mr. BLAKE:

Q. You live still further back?

A. Yes, sir.

Q. And own some property up there?

A. Yes, sir.

Q. What do you think that property is worth now, Mr. Johnston?

A. I don't think it has doubled within the last year. I think it has increased, perhaps, from 5 to 7 hundred dollars on the acre in the last year.

Q. Are you not figuring on the value of this property after it has been cut up into lots and sold out?

A. The same as you would figure on any piece of property—what it would bring.

Q. Are you not figuring on it after it is cut up into lots?

A. If a man bought it for that purpose he would pay accordingly.

Q. Do they generally pay as much in that form as they do after it has been cut up into lots?

A. Certainly not; but a tract in that locality and with the improvements on it, I think that is a fair estimate.

Q. I believe you have not yet answered my question as to what it is worth now?

A. I think $700 more than a year ago.

Q. Something like $2,000 now?

A. Yes, sir.

Q. How much more, if anything, is it worth than the 40 immediately east?

A. I should say from 5 to 700 dollars an acre more. I differ from the other gentlemen for the reason Mr. Cowley's house and the ground is improved. The elevation is different from what it is north. You go north this way and you find a good many rocks.

289 Q. You know how this 120 acres of land lays?

A. I do.

Q. What do you say about this 7 and a half acres immediately around his house, as to whether this is worth more?

A. I think it is worth more on account of the elevation.

Q. You think it is worth more?

A. I think so. I had rather have it.

Q. You think it would sell for more than an average?

A. I do; the Congregational Church, &c. I think that that elevation there—a man would rather have it on the high ground.

Q. How much per acre?

A. Well, I think that would depend altogether upon what a man wanted it for.

Q. On the same as we were talking about just now, what it would sell for.

A. That property is all good for residence property. I would rather have that and pay $100 more an acre for it.

Furthermore witness sayeth not.

290 Mr. JAMES DUNHAM, being first sworn and called for defendant, testified as follows:

Direct examination by Mr. ASHTON:

Q. Where do you reside, Mr. Dunham?

A. Spokane Falls.

Q. You have lived here how long?

A. About three years.

Q. What business are you engaged in?

A. Real-estate business.

Q. What has been the extent of your business in that line or your experience in that line?

A. Being engaged in the business, have had a good deal of experience.

Q. Have you had occasion to ascertain and learn the value of property?

A. Yes, sir; every day.

Q. In every portion of the city?

A. Yes, sir.

Q. Do you know the place where Mr. Cowley's residence is located?

A. Yes, sir.

Q. How long have you been acquainted with that location?

A. Between two and a half and three years.

Q. From your knowledge and experience acquired in dealing in real estate here, have you been familiar with the value of property where his house is located for the last three years?

A. Yes, sir; I have.

Q. What, in your judgment, would be the reasonable value of that property in this city on the 10th day of May, 1888? State your valuation at so much per acre.

291 A. Well, I should think the property worth about $2,000 per acre.

Q. You regard that as its reasonable value at that time?

A. Yes, sir.

Cross-examination by Mr. BLAKE?

Q. Do you know where this property—the house of Mr. Cowley and the 7 and a half acres immediately around it—is situated in regard to the whole 120-acre tract in dispute?

A. I do.

Q. Where?

A. It is right over in this direction (pointing).

Q. What part of the 120 acres is it on?

A. I should think on the southeast part of it.

Q. 120 acres, laying three 40's in a row?

A. Yes, sir; Mr. Cowley's house is sitting over here, and that would be the northeast part of it. He is on the northeast part of the 160, I guess.

Q. Don't you know he is on the south 40 of the three 40's, as spoken of?

A. Well, really, I don't know whether he is on the south 40.

Q. We suppose he is. His house is on the south 40 of the three 40's. Now what is the value of the 7 and a half acres that you speak of, immediately surrounding his house, in comparison with the tract—the whole tract together, more or less?

A. Well, if I was to rate it, I should say that the property north of his house, on the high ground, was a little more valuable.

Q. You don't understand my question. Is that property immediately surrounding his house an average, or more than an everage, of the whole 120, in your opinion?

292 A. I should think it was an average—that is, there are some portions in Mr. Cowley's plat that lay high and some low. It will average up well with the balance of the property.

Q. There is a whole 100 acres north of his house and extending up here to the Congregational church, isn't there?

A. Yes, sir.

Q. And that is about an average?

A. Yes; I should think so.

Q. What is the 40 immediately east of his house—what was it worth last May?

A. Well, I should think about the same figure.

Q. A year ago last May?

A. Yes, sir.

Q. I will ask you if you don't know that the east 20 of that 40 was sold for $1,500?

A. It was so reported.

Q. I will now ask you if that property hasn't advanced in value 100 per cent. within the last year?

A. I think it has.

Furthermore witness sayeth not.

293 Mr. H. T. COWLEY, recalled, testified as follows:

Direct examination by Mr. ASHTON:

Q. I wan't to ask you, Mr. Cowley, about this power of attorney given to Mr. Hagan, which has been spoken of in the case heretofore. Do you remember about when you gave to Judge Hagan that power of attorney?

A. Yes, sir.

Q. You say it didn't refer to this case?

A. Not to this; it referred to his going East and endeavoring to compromise this case.

Q. Well, that power authorized him to effect a settlement involving this property?

A. On certain restrictions.

Mr. BLAKE: I object to the contents of this power till it is shown that it is lost and there is no copy of it.

REFEREE: I sustain objection.

Q. Has that power of attorney been revoked?

A. Yes, sir; that power of attorney was limited and the parties were discharged from action in the case since.

Q. You say it was limited. What do you mean by that?

A. I mean what I say in that respect. It was limited to a certain course of procedure.

Q. What was that restriction?——

Mr. BLAKE: I object to the contents of that power till the loss of the instrument is proven and that there is no copy.

Referee sustained objection.

294 —(Continuing:) What was the nature of that limitation to which you refer?

A. The instruction Mr. Hagan received was to proceed East, at his own request, and endeavor to effect a settlement, and he advised me to write him a letter of instruction in connection with the power of attorney, which I did. As soon as he saw those instructions, although he stated that he would not have anything to do in the way of suggesting as to what they should contain, he declined to go, and the matter was dropped, and on the following day we had a conversation with Messrs. Ganahl & Hagan to the effect that either they must stop talking about compromise or go ahead with the case, and they decided to go ahead.

Q. Now, that was along in February, last year?

A. No, sir; in April.

Q. April, 1888?

A. Yes, sir; about the first of April.

Q. In what manner have you revoked that power of attorney?

A. As I say, that power was limited to that one procedure.

Q. Nothing else?

A. No, sir.

Q. If it was in existence it would so state?

A. Yes, sir; that gave only power to act on that one proposition.

Q. Your recollection is quite clear about that?

A. Yes, sir.

Cross-examination by Mr. BLAKE:

Q. What did you say Mr. Hagan said to you about your making the terms?

A. Mr. Hagan expressly stated that it would be impossible for him to make terms; that I must make my own terms.

Q. And did you do so?

A. I did.

295 Q. And when he saw the terms of the power of attorney you say he declined to act upon it?

A. He refused to go.

Q. Why?

A. He said he wouldn't accept those terms and spend his time and money in making an effort.

Q. Were these terms anything like the terms mentioned at your house on the 10th of May, when Mr. Schultze and Mitchell were present?

Q. They were entirely different.

Redirect examination by Mr. ASHTON:

Q. You never gave Mr. Hagan but the one power of attorney?

A. That is all.

Witness excused.

296 Mr. FRANK GANAHL, recalled for defendants, testified as follows:

Direct examination by Mr. ASHTON:

Q. Judge, in your former examination in this case you referred to a power of attorney as having been given from the plaintiff to your partner, Judge Hagan.

A. I did, sir.

Q. And I believe you stated that that power of attorney was lost or mislaid or, in any event, could not be found?

A. I don't think that was the exact testimony. I believe I said I could find that power. I didn't state it had been lost.

Q. Have you made any effort to find the same?

A. I have the power.

Q. Have you got it with you?

A. I have.

Q. Will you please produce it. (Power produced.) Where did you find this?

A. I found it in my desk, between the drawer and other papers.

Q. In your office in this city?

A. Yes, sir.

Counsel for defendant now offers in evidence a certain paper as being the power of attorney referred to and asks that the same be received and marked Exhibit —, and to that end delivers the same to counsel for plaintiff for inspection.

Mr. BLAKE: I object to its admission on the ground that — nowhere appears that this settlement which was attempted to be made on May 10th was made under that power of attorney or pursuant

297 thereto, and upon the further ground that it nowhere appears that the stipulation filed in the district court by Messrs. Ganahl & Hagan and Mr. Mitchell and the judgment which was rendered thereon was filed in pursuance of that power, and for the

further reason that testimony shows that the power has been revoked. I am willing that it should go in over that objection without any argument.

REFEREE: I overrule objection.

Q. Judge Ganahl, I will ask you if you know, of your own knowledge, anything of the circumstances which resulted in the giving of this power of attorney.

A. I do, sir.

Q. State fully and in detail what you know.

A. I will state this, that the facts and circumstances which led to it are as plain to me as of yesterday. I will state this, in justice to myself and also to both sides of this controversy, that the stenographer handed me the testimony of Mr. Cowley in this case; the testimony of Mr. Hagan I have not seen; a portion of it was read to me this morning by the stenographer; I asked him to. I was employed by Mr. Cowley to fight this suit. There was a long negotiation with Mr. Ritz, as the agent of Mr. and Mrs. Cowley, to go East to make a settlement. I drew a seroes of instructions to Mr. Ritz, all of which Mr. Cowley has. I think I have duplicate copies made at the time; I will not be certain; that is my impression. Mr. Cowley was so anxious to effect this that he paid Mr. Ritz's expenses, and whatever Mr. Ritz got of this he, Ritz, was to get half.
298 Hagan was to get one-fourth. When Ritz returned, I had it from Mr. Vowley as his statement to him, and I also have the same statement from Mr. Ritz, and I have the same statement from Mr. Hagan, that the company would make a proposition, and that something would be done. Upon that, for the purpose of compromising this suit and ending this litigation, I was instructed by Mr. Cowley to draw this power. It was absolute and full and the whole matter and the responsibility of the compromise was left with Judge Hagan. Therefore when, on the 10th of May, 1888, we had started to take this testimony—Mr. Cowley was in my room and Judge Hagan was in his; he was then in partnership with Mr. Hyde——

Mr. BLAKE: I object to this.

I am leading up to it. I was necessitated rushing to the land office——

Mr. BLAKE: I object.

But I am leading up to it. I met Judge Hagan on the landing of the stairs. Judge Hagan says to me: They have made an offer. I told him I didn't want to hear that.

Mr. BLAKE: I object.

REFEREE: I overrule objection.

I said to Mr. Hagan I preferred him to make that statement to Mr. Cowley. I went in and found Mr. Cowley and said: Go get Mrs. Cowley.

Mr. BLAKE: I object. This testimony has all been given.

That power has never been revoked.

Mr. BLAKE: I move to strike from the records the above.

REFEREE: I had rather reserve my decision.

299 I will state further that the stipulation signed by Judge Hagan I never saw. I have been told its contents and ratify every act Judge Hagan has done. I will state further, when I was instructed to draw this power I dictated it to my stenographer. It was struck off in duplicate, and I handed both copies to Mr. Cowley, and he returned this to me, executed by himself. I handed it to Judge Hagan. The other papers in the case were turned over for safe keeping to me. I would like to make one further statement in reference to this case in justice to myself——

Mr. BLAKE: I object to this testimony for the reason it is immaterial and irrelevant.

REFEREE: I reserve my decision.

I desire to state in reference to the statement made by Mr. Cowley that he felt that he was being treated falsely by his attorneys, that under this compromise Mr. Cowley got more, in my estimation, than under the Ritz proposition, and in my judgment, although I had nothing to do in effecting the settlement, it was a just and fair compromise of this litigation.

Mr. BLAKE: I move to strike out the above. I do this on my professional oath.

Q. Judge, yourself and Judge Hagan, after your dissolution as law partners, continued in the same legal relationship to this case?

A. Yes, sir; he was then, at the time of this settlement, in partnership with Mr. Hyde.

Q. And you so continue?

A. Yes, sir.

Cross-examination by Mr. BLAKE:

300 Q. Judge, where did you find this power?

A. I found it, sir, in my desk in my office. I could have found it the other day if I had have had 10 minutes' time.

Q. When did you see it first after you were here the other day?

A. I saw it first, sir, about an hour ago.

Q. Did you ever look for it before?

A. I looked over some papers yesterday with a view to finding this power with other papers.

Q. Didn't succeed in finding it till today?

A. Didn't look for it till today.

Q. You were looking for it yesterday, were you not?

A. No; not especially; was looking for other papers and expected to find them together.

Q. Did you find any other papers connected with the case with *with* these papers today?

A. No, sir; I found other papers yesterday—duplicates of all the original papers which Mr. Cowley promised to bring back.

Q. Wasn't there a letter of instruction accompanying this power written at this time?

A. I never saw any, sir. If he did he gave it to Mr. Hagan.

Q. How long has this power been in the place where you found it today?

A. Upon Judge Hagan's leaving here to go to Cœur d'Alene, last summer some time or last spring some time, during the summer of '89, he returned that power with other papers he had of the Cowley case, so that I might keep them together. I don't think he has any papers in the case. If any letter was written it was given to Judge Hagan, the agent mentioned in this power.

Q. This was given to you by Judge Hagan in the summer of '88?

301 A. '89.

Q. '88?

A. '88; yes, sir; after the suit was settled. I will say further, in answer to that, Mr. Graves should have been the proper executor of that power.

Q. You say you remember distinctly the circumstances that led to the execution of this power?

A. Yes, sir.

Q. Mr. Ganahl, what was he to do under this power?

Mr. ASHTON: I object on the ground that the instrument speaks for itself.

Q. What was spoken between Mr. Cowley and Mr. Hagan in regard to where he was to go and how he was to undertake to carry out this power?

Mr. ASHTON: I object.

A. I don't know.

Q. Were you present when it was delivered to Mr. Hagan?

A. Yes, sir. I delivered it to Mr. Hagan under Mr. Cowley's instructions. I delivered that to Mr. Hagan. Mr. Metcalf struck two copies off. I handed them both to Mr. Cowley and he took them, and in two days afterwards returned this just as you see it. I delivered that to Mr. Hagan.

Q. Wasn't there a letter of instructions delivered with that?

A. No, sir; I never saw any letter of instructions.

Q. Do you know what efforts Mr. Hagan made, if any he made, to effect this settlement?

A. I don't.

Q. Did he go East at any time to effect a settlement under this power?

302 A. Not to my knowledge.

Q. Do you know of any effort he made at any time to settle this case under this power?

A. Simply his own declaration; his talk to me.

Q. Wasn't it talked that he should go East to execute this power and see officials of the company about the time it was executed?

A. By whom?

Q. Between you and him and Mr. Cowley?

A. Not that I remember, sir. I will state this, that about that time Mr. Hagan expected to go East.

Q. Don't you know that he was about to go East, and that this power was made with reference to his going East?

A. No, sir; I don't.

Q. What was the immediate occasion of the execution of this power?

A. The immediate occasion of the execution of this power was as I have stated before, was the return of Mr. Ritz and his communication to Mr. Cowley and Mr. Hagan that the company would settle it, and thereupon I was instructed to draw this power.

Q. That was with a view to immediate settlement, was it?

A. Settlement of some kind.

Q. Wasn't it in view of an immediate settlement of it?

A. No, sir.

Q. You mean to say that this power was drawn for the purpose of giving Mr. Hagan all time to settle this case in?

Mr. ASHTON: I object to the last question on the ground that it is thoroughly irrelevant. The power speaks for itself and
303 shows on its face the object and purpose for which it is given.

A. I can't answer that question. I decline to answer it.

Q. All right, sir.

A. I will simply, if your honor pleases—I will state there was no limitation. I never heard of a power to run to eternity.

Q. Did he make any effort under this power to settle this?

A. As I said before, I only know what he said.

Q. What did he tell you?

A. He said he had done everything he could.

Q. Was he any more specific than that?

A. It was none of my business to ask.

Q. Do you know whether he went to Tacoma?

A. I don't know whether he went to Tacoma. He was running backwards and forwards over the road, so much so that we called him "——." Where he went to or what his plans were I didn't inquire.

Q. Do you mean to tell the court that you drew this power without any conversation with Mr. Cowley as to how he was to go about and carry it out?

A. I mean to tell the court exactly the truth, that the power was dictated in my presence by me to the stenographer, and two copies struck off and handed to Mr. Cowley. Cowley told me that he had been talking to Hagan about it.

Q. Well, sir, we don't care about any arguments. I repeat the question: Do you mean to tell this court that you drew this power without any conversation with Mr. Cowley or Mr. Hagan as to the manner in which he was to proceed to carry it out?

A. I mean to tell this court what I have already stated, that I

was instructed to draw this power by Mr. Cowley; that he
304 so instructed me, as the result or in pursuance of the conversation with Mr. Hagan after the return of Mr. Ritz, that Hagan was to effect this compromise, but as to telling you how he was to do this I never inquired.

Q. Did Mr. Hagan or Mr. Cowley tell you how he was to proceed?

A. No, sir.

Furthermore witness sayeth not.

Counsel for defendant now makes the following statement, which he desires to go into record: that on account of the testimony of Judge Ganahl, the last witness, showing that the power of attorney referred to has been found since the testimony of Mr. Schultze—at least, since the commencement of the taking of that testimony—he now desires to recall the witness, Paul Schultze, for the purpose of having further testimony bearing thereon.

305 Mr. PAUL SCHULTZE, recalled for defendant, testified as follows:

Direct examination by Mr. ASHTON:

Q. Were you in New York in the year 1888?

A. I was in New York in the year 1887. I arrived there on or about the 10th of December, '87. I was in Washington and Philadelphia till the 5th of May, '88.

Q. Did you meet Mr. Ritz there, the gentleman referred to in Mr. Ganahl's testimony?

A. I met him; yes, sir.

Q. Did you become familiar with his business?

A. I did; yes, sir. I was fully advised of it. I was advised of it by wire.

Q. What did you understand was his business there?

A. To effect a compromise.

Q. State fully the result of this compromise. What did you have to do with it?

A. When I heard what he was going for I proceeded to Philadelphia to the chairman of the land committee and stated to him that the board of directors had already passed a resolution authorizing, upon my recommendation, a settlement of this suit within a certain limit, and that if Mr. Ritz was to interfere I would resign in favor of him, and he assured me that Mr. Ritz had been told what the board had done, namely, authorized me to settle within a limit of $15,000; of course, I don't remember the date.

Q. Was it prior to the 28th day of February, '88?

A. Yes, sir. I expected to return much sooner, but was detained upon new and other business involving the sale of some lands which kept me there three months longer. When I left the coast
306 I expected to have been home in about two months. Mr. Ritz further told me that he had communicated to Mr. Cowley the information that had been given to him in regard to the compromise.

Q. When and where did he make that statement to you?
A. Upon my return to the coast. I couldn't give the time now.

Furthermore witness sayeth not.

307 Mr. H. T. COWLEY, recalled on his own behalf, testified as follows:

Direct examination by Mr. BLAKE:

Q. Mr. Cowley, you heard the testimony of Mr. Schultze in regard to that part of the conversation at your house on the evening of May 10th, touching the church property. Tell the court what was said on that subject.
A. You mean all?
Q. Yes, sir; there at the house.
A. Well, the matter came up in this way: On the day which this proposed compromise was made, the time of my final conversation with Judge Hagan in regard to the different points of law, I said to him, "I suppose we will have to accept this compromise as the best we can do. Mrs. Cowley doesn't feel disposed to accept this compromise; it may influence her if Mr. Schultze will make an exception to that part of the proposition; I don't know, but I think very likely that would have some influence in her deciding the matter." I will get Mr. Schultze and we will bring the matter before him.
Q. What was said at the house?
A. At the house Mr. Schultze brought the matter of the church lots up and spoke especially with my wife about it. I can't recollect all that was said, except that he was willing to grant those lots on his own account, outside of the north side of the track back of where the company wanted to reserve that for their own use.
Q. Was there anything said about that church-lot proposition not being a part of the compromise?
A. If there was anything said I didn't catch it. I don't
308 think it was impressed on my mind that that was a part of the concession, but a part of the influence to be brought to bear on Mrs. Cowley to induce her to accept the proposition.
Q. Was there any description in writing or in the way of a plat or anything of that sort present there that night at your house?
A. I think not.
Q. Or of any part of the land?
A. No, sir.
Q. You have heard the testimony of Mr. Ganahl and Hagan in regard to the power of attorney that has been introduced into evidence. You may tell the court if there was—you may tell the court to whom you delivered that power of attorney.
A. I delivered it to Mr. Hagan.
Q. Was there any letter written or paper delivered to him by you at the same time?
A. There was; yes.
Q. What was that?
A. It was a letter of instruction written at his request and refer-

ring to the power of attorney of the same date, in which he was limited to certain terms.

Q. Have you seen that letter since you delivered it to Mr. Hagan?

A. I have not.

Q. Do you know where it is?

A. I do not; my impression is it was delivered in Ganahl's office.

Q. It was delivered to Mr. Hagan?

A. Yes, sir.

Q. Where does he live now?

A. In Cœur d'Alene.

309 Q. In what Territory?

A. Territory of Idaho.

Q. You don't know that he is in this Territory now, do you?

A. I do not.

Q. Where was he the last you heard of him?

A. I heard Mr. Hinckle say yesterday he was in Murray.

Q. Idaho?

A. Yes, sir.

Q. I will get you to tell the court—I will ask you first, however, if you have any copy of that letter of instruction?

A. I have not.

Q. Is there any in existence that you know of?

A. Not that I know of.

Q. You may tell the court what the contents of that letter of instruction were.

Mr. ASHTON: I object to the last question as being incompetent, there being no sufficient foundation laid for the taking of this class of testimony.

A. The essence of the proposition of compromise. There were two propositions. One was to purchase the land claimed by the company for $45,000 and give them the right of way to the property which they now occupy. The other was to sell to the company for $45,000.

Q. Your claim?

A. My claim with the improvements—reserving 15 acres—selling all but 15 acres for $45,000.

Q. What other limitations were put upon that power by that letter, if any?

310 A. Those were all the limitations.

Q. What about division?

A. I am not certain about that. I know that was in my — I can't be certain about the proposition of division. I remember that the letter was quite brief, and whether I got in the proposition of division of the property I don't remember. I distinctly remember the other two propositions.

Q. Have you stated now the substance of that letter?

A. Yes, sir; the introduction of the letter was with reference to the power of attorney to which Mr. Hagan would be authorizes to settle with the company—was "on the following terms," and then I stated the terms.

Q. As you have already stated them?
A. Yes, sir.
Q. Was there any proposition in that letter to take certain lands and $8,000 in money, or anything of that sort?
A. No, sir; nothing of that kind.
Q. You say you delivered that power and letter to Mr. Hagan?
A. Yes, sir.
Q. Did he examine them?
A. Yes, sir.
Q. What did he say?
A. Said it would be useless for him to proceed on those terms; said he knew about what the company would be willing to accept, and it would be useless for him to proceed East with any such proposition.
Q. Well, what did he do?
A. The matter was dropped then and there as to that matter, and I called upon Judge Ganahl and Hagan together and stated
311 I would like to have a talk with them in regard to our final disposition of the case.
Q. I don't care for that. Was he going East with that power?
A. That is what he suggested.
Q. At once?
A. Within a week from that time. He proposed to go the following week.
Q. What did he say about going when you wrote that letter of instruction?
A. He said he wouldn't go.
Q. Did he go?
A. He didn't.
Q. Did he ever make any effort to settle that case under that power of attorney?
A. If he did he didn't make me aware of it.
Q. You remember the day of the month the district court opened here last May?
A. On the 21st of May.
Q. What date was it that the testimony was to be continued before the referee under the notice that you received?
A. On the 21st.
Q. What time in the day?
A. At two o'clock.
Q. P. m.?
A. Yes, sir.

Witness excused.

312 Mrs. H. T. COWLEY, recalled on behalf of plaintiff, testified as follows:

Direct examination by Mr. BLAKE:

Q. Did you ever see this power of attorney that your husband has just been speaking of?
A. I signed it in Mr. Strobach's office.

Q. Were you present when it was delivered to Mr. Hagan?
A. I think not.
Q. Did you see the letter of instruction that accompanied it?
A. No, sir.
Q. Did you see Mr. Hagan soon after the delivery of that power and letter to him?
A. I did.
Q. Where did you see him?
A. On the south side of Riverside avenue.
Q. Have any conversation with him about the matter?

Mr. ASHTON: I object to the last question as being irrelevant, incompetent, and immaterial.

A. Yes, sir. He stated that with that letter of instruction it was no use to go East. He knew they wouldn't give him one-half the property.
Q. Well, what did he say about whether he was going?
A. He said he wasn't going; it would be of no use to go.

Witness excused.

313 Cross-examination by Mr. ASHTON:

Q. Mr. Cowley, you stated you delivered this power of attorney to Judge Hagan; please state where you delivered it to him.
A. I can't recall. I think in Judge Ganahl's office. That is my impression.
Q. When was it?
A. I can't state the time of day; very shortly after its execution.
Q. About how long after its execution?
A. It couldn't have been more than a day or two. My wife was ill at the time and I can't state just exactly when we came down to the notary public's office.
Q. Where was Judge Ganahl's office at that time?
A. It was adjoining Turner & Forster's office.
Q. In the Hyde block?
A. Yes, sir.
Q. Who was present?
A. I can't recall that there was any one present except Judge Ganahl and Hagan together.
Q. You are quite sure Judge Ganahl was there?
A. I am not sure.
Q. Did you have any conversation with Judge Hagan at that time or do anything other than deliver the power to him?
A. I can't recall about that. My impression is I delivered the letter and power of attorney about the same time.
Q. Now, are you quite sure you didn't deliver this power of attorney to Judge Ganahl?
A. I didn't understand quite.

Q. Are you quite sure that you didn't deliver this power
314 of attorney to Judge Ganahl for Mr. Hagan?

A. My strong impression is, to Judge Hagan.

Q. Then you are not positive about that?

A. No.

Q. Is it not a fact, and I ask you to think the matter over—is it not a fact that Hagan wasn't present at all, and that you delivered this power to Judge Ganahl, with the request that he deliver it to Mr. Hagan?

A. I am not able to deny that or confirm it.

Q. Then, as a matter of fact, you don't remember definitely anything about this matter?

A. Of course, I remember a good deal about the matter.

Q. You have told us, however, your best and only recollection of the circumstances connected with the delivery of this power of attorney?

A. Yes, sir. I know it reached Mr. Hagan's hands.

Q. Will you swear that Mr. Hagan was in this city on the date you delivered this document?

A. I can't fix the date.

Q. Will you swear that Mr. Hagan was in this city on that date?

A. I wouldn't swear either way.

Redirect examination by Mr. BLAKE:

Q. I understood you today that at the time the power was delivered a letter accompanied it, was delivered with it also?

A. Yes, sir.

Q. You may look at that, Mr. Cowley (handing witness paper). I will ask you, Mr. Cowley, if this is the notice you referred to in your testimony as the——

A. Yes, sir; that is the notice.

315 Recross-examination by Mr. ASHTON:

Q. I understood you to say that you delivered this letter at the same time you delivered the power of attorney?

A. That is my impression. I suppose they went together. I can't recall the exact time and place.

Q. Then your recollection of the final surrender or delivery of the power of attorney is the same time as the delivery of the letter?

A. Yes, sir.

Furthermore witness sayeth not.

316 Mr. ALBERT HAGAN, recalled in behalf of defendant, testified as follows:

Direct examination by Mr. ASHTON:

Q. Have you read the testimony of Mr. and Mrs. Cowley in this action?

A. I heard you read it over just now in the other room.

Q. I direct your attention to that portion thereof relating to the delivery of a certain power of attorney to you.

A. Let me have the power of attorney, please, and also the testimony of Mr. Cowley.

(Hands witness the requested documents.)

Q. And I ask you to take this document and state whether or not you recognize it.

A. I recognize this document as being the power of attorney delivered to me by Judge Ganahl on my return to the city. Mr. Cowley never delivered me that power of attorney, but notified me he had left it in Judge Ganahl's office. I had been previously notified by Judge Ganahl that the power of attorney was there waiting for me. I was then thinking of going east, to St. Paul, on matters concerning this settlement. Mr. Cowley notified me in my office—not Judge Ganahl's office I was notified—I should rather say that Mr. Cowley said to me that he had made me a power of attorney, and it was all ready to take when I was going east. I didn't tell Mr. Cowley what I knew of Mr. Schultze's movements—some said he was in St. Paul and some in New York. I intended to go and see the attorneys and catch Mr. Schultze at St. Paul. That was my first intention. Mr. Cowley's statement that he delivered a letter to me when he delivered this power of at-

317 torney is not true. Mr. Cowley never delivered at any time a letter restricting in any manner——

Mr. BLAKE: I object.

But I will explain what he did do. Mr. Cowley, to some extent, is correct in some parts of his testimony; he should have the credit of what is correct. I said to Mr. Cowley—that was afterwards, two weeks afterwards, because in the meantime I had gone to Oregon and returned—that I would like to have his ideas, as this power was absolute and unlimited. I would like to have his ideas before I settled the case, as to what he considered more favorable to himself, knowing that he wanted to reserve some part of his improvements if a compromise could be made. I didn't know the description, as I testified in chief, of that land. I therefore didn't want to make a compromise——

Mr. BLAKE: I want him to state what he said.

I said to him I didn't know the description to that land, and asked him to give me a memorandum of what would be his desire in the matter. I think he came to my office—not to Judge Ganahl's office—and I think had a memorandum with him containing, as he says, at least two propositions on which I should work in the compromise, which propositions I never took, nor did he leave them with me that I remember. Then, after some time, I won't say how long, Mr. Cowley wrote that memorandum, and what he did was at my request, because I thought that I preferred to consult with him. As for him placing any restrictions or writing me any letter, I say it was not true.

318 Q. Now, did you ever notify or cause others to notify or have Mr. Schultze or any other official or representative of the defendant notified of your knowledge of these desires and ideas of Mr. Cowley, aside from what is expressed on the face of that power of attorney?

A. No, sir; I went to Mr. Cowley privately and told him to give me his ideas; it was at my request.

Q. And those ideas and desires were never communicated to the defendant, as I understand you?

A. No, sir; not to the plaintiff, The Northern Pacific Railroad, or any of its officials or agents.

Q. At that time the defendant in this case?

A. Mr. Cowley is defendant, isn't he?

Q. No; not in this case.

A. It had never been communicated, but, on the contrary, I told them that I had a full power of attorney, but I didn't want to settle it without seeing Mr. Cowley first; that was the day of the settlement.

Q. What report, if any, did Mr. Ritz make as to his efforts in effecting a settlement after his return from the east?

A. The report was that he couldn't settle the case upon the terms that he went there to settle it upon or anything near it. He reported that to Mr. Cowley and myself. We were together. Then he reported to me twice afterwards at the Grand hotel—no, at the Windsor. At the time of his first report I was at the Grand; I moved from the Grand to the Windsor.

Q. You remember what he said?

A. He said, among other things, that——

Mr. BLAKE: I object to this evidence as being incompetent,
319 irrelevant, and hearsay evidence and as not being in rebuttal to anything heretofore — by the plaintiff's witnesses.

REFEREE: I reserve my ruling.

A. He said that a settlement could not be adjusted and wanted to make another trial; to which I told him if Mr. Cowley would consent I had no objection. Mr. Cowley never did it, I believe, not to my knowledge.

Q. Did he say anything about an ultimatum or figures he had obtained in New York, or that he had heard Mr. Schultze express?

A. I think he reported that to Mr. Cowley; I don't know if he did.

Mr. BLAKE: I object to this evidence as being incompetent, irrelevant, and hearsay evidence, and as not being in rubuttal to anything heretofore — by the plaintiff's witnesses.

REFEREE: I reserve my ruling.

Q. You remember what it was?

A. I can't state as to that, but my impression is it was $5,000; but I don't know about that; I don't want to be bound by that, either, because that is my impression.

(WITNESS:) I wish to state with reference to the propositions contained in Mr. Cowley's testimony what he gave me on that memorandum I spoke of at the time he made it.

Mr. ASHTON: I don't think that is material.

(WITNESS:) I wish to state I am not prepared to deny that
320 these propositions are the ones he made this memorandum by, but he did not leave any letter with me restricting my powers thereby.

Cross-examination by Mr. BLAKE:

Q. You say Mr. Ritz reported to you he had seen the railroad officials and gave them propositions from Mr. Cowley of settlement?

A. Yes, sir.

Q. And that they wouldn't accept?

A. They wouldn't. He failed and came back.

Q. And, further, that it is your impression that he came back and stated that the railroad company were willing to give $5,000?

A. Mr. Schultze; he thought, if made at all, it would have to be made through Mr. Schultze.

Q. Didn't he tell you he hadn't been able to see any of the railroad officials?

A. No, he didn't tell us that, Mr. Blake. On the contrary, he reported to us that he had seen some of them, but not all that he wanted to see. His great idea was to see Mr. Wright. He wanted to see Mr. Wright—he told Mr. Cowley so at my house.

Q. Who did he see?

A. I don't know what he said about who he did see in detail; simply that he had failed in his mission.

Q. Didn't he say, or did he say, that the reason he failed was he hadn't been able to reach the railroad officials?

A. He might have given that as one reason; another was they wouldn't entertain his proposition.

Q. Did he say he had seen any of them?

A. Yes, sir; but I don't remember. Mr. Schultze, he said, was the party preventing any compromise.

Q. You say you can't tell who he saw?

A. No.

321 Q. Did he say he had seen Mr. Schultze?

A. I think he did.

Q. Did he say what he said?

A. Yes, sir; Mr. Schultze cut him off very short. Mr. Schultze laid him down an ultimatum, and he said that he didn't think it could be settled with him, as Mr. Schultze was in between him and the parties he wanted to see.

Q. Did he say he saw any other railroad officials?

A. I don't remember that he did.

Q. After this you received this power of attorney you have spoken of?

A. Yes, sir; what date I don't remember.

Q. And that was with a view to going on to St. Paul to have a conference with the attorney of the road about the time Mr. Schultze came here?

A. Yes, sir.

Q. Did you have any other object or business in going to St. Paul?

A. No; I didn't know but what I would have to go to Tacoma.

Q. And you say it was about two weeks after you received the power of attorney that you got the memorandum?

A. I think it was at least that time. It was some days.

Q. You said weeks a little while ago?
A. I don't know the exact time, but I can refer to my diary.
Q. Why was it in the meantime you hadn't gone on East?
A. I was waiting to find Mr. Schultze or Mr. McNaught.
Q. Didn't you know that Mr. McKnott was in St. Paul?
A. He had gone East somewhere.
Q. When did he get back to St. Paul?
A. I don't know.

322 Q. Before you got this memorandum or afterwards?
A. I don't know. I was to take my own time and my own way, whether I went to St. Paul or not.
Q. I am not talking to you about that.
A. My opinion was that they were both East, and also that a certain day in February that Mr. McKnott was in St. Paul.
Q. Mr. McKnott was in St. Paul, as I understand, and Mr. Schultze would come to St. Paul?
A. That was in February, at the time that power was executed.
Q. Before it was executed?
A. Yes.
Q. Well, before you ascertained their whereabouts you saw Mr. Cowley and mentioned this memorandum to him?
A. Yes, sir. I didn't put myself to much trouble to find out where they were. I was just waiting to settle this case the best way I could. Mr. Schultze was a stranger to me; I had never met him.
Q. Did you learn where he was prior to the time he came here?
A. No, sir; not definitely.
Q. What did you say you said to Mr. Cowley, when you met him, about his desires?
A. I told him, as I said before, I would like for him to let me know his desires in the matter, what propositions he had, and whether he wanted land or money or both. I was to get one-fourth of it, myself and partner, and he understood that. I wanted to know from him what would be the most favorable terms in his opinion, and that is the way he came at it. He made a memorandum, I think, as he states.
Q. Did he sign that memorandum?
A. I don't think so.

323 Counsel for defendant object to all this testimony relating to this memorandum, it being shown by the previous testimony of the witness on the stand that the defendant never had any knowledge or notice, actual or otherwise, of its contents and terms, and therefore it is entirely immaterial.

Might be that he did leave that memorandum with me, but I have no idea that he did.
Q. If you retained that memorandum, where is it now?
A. If I retained it?
Q. Yes.
A. Why, that would be a singular thing for me to answer. I can't answer that. I remember that he laid a memorandum on the table. I made a same memorandum at the same time.

Mr. ASHTON: I object to all testimony relating to this memorandum, as it has been proven that the defendant has never had any knowledge or notice of its contents or terms, and therefore it is entirely immaterial.

(Witness continuing:)

I don't know that I ever took that off the table.

Q. You have no knowledge of its whereabouts now?

A. I have none. If Mr. Cowley ever wrote me a letter, I don't remember anything of the kind on earth. I told him I wouldn't be restricted to any one thing.

324 Q. You say you did voluntarily ask him for these propositions?

A. These propositions were not restrictions. I thought it my duty to consult with him because he didn't have the same ideas two days at a time about this case.

Q. You didn't see Mr. Schultze or any other railroad official with regard to a settlement of the case, under this power or otherwise, till about the 10th day of May?

A. Did not.

Q. You didn't go anywhere to see any such person in that business?

A. Did not.

Q. On the 10th day of May, you say, you told this gentleman that you had a power of attorney—a full power of attorney?

A. I made that remark to Mr. Mitchell, that I was empowered by Mr. Cowley to settle this case.

Q. Now, let us hear what you told him?

A. I told him what I told you.

Q. You said in your testimony-in-chief that you thought you told them that you had a full power of attorney.

A. I don't know whether I used power of attorney or authorized.

Q. You say you said either a full power of attorney or authority?

A. Either; I don't remember.

Q. Who did you have this conversation with?

A. It wasn't a conversation; I just said that.

Q. When did you say that to Mr. Mitchell?

A. When he talked to me about the settlement that morning.

Mr. ASHTON: I object to that as not being cross-examination in any way.

Q. You told Mr. Mitchell you had full authority. Now, how did you come to tell him that?

325 A. Mr. Mitchell came over the morning of the trial of this case, as I told in my examination-in-chief. During the conversation that Mr. Mitchell and myself had—a preliminary conversation—he asked me if I had any propositions to make to him that morning, or something to that effect; I couldn't tell all the conversation in detail, but I said I am authorized to settle this case or something of that kind.

Q. Is that all you said to him on that subject?

A. I guess so.

Q. You don't mean to add anything to your testimony when you were on the stand before?

A. No, sir.

Q. Still, you intend to tell all that conversation so far as you remember it?

A. Pertaining to this matter.

Q. And you do not pretend to say that you told Mr. Mitchell a power of attorney?

A. I have said three times I was authorized to proceed to settle.

Q. And you said nothing to Mr. Schultze on that subject?

A. No, sir; I didn't. I had very little conversation with Mr. Schultze. Mr. Cowley and Mr. Schultze did the most of the talking, and Mrs. Cowley.

Q. You said, in answer to Mr. Ashton's question, that you didn't inform the railroad people anything about this memorandum or its contents?

A. I certainly didn't.

Q. And you didn't inform them anything about the contents of this power of attorney?

A. No, sir.

326 Q. You didn't inform Mr. Schultze or Mr. Mitchell that you were the attorney-in-fact for Mr. Cowley?

A. Further than I remember on the surface; but, as I say, I made the remark, "I am authorized to negotiate with Mr. Schultze."

Furthermore witness sayeth not.

A. HAGAN.

327 Mr. PAUL SCHULTZE, recalled for defendant, testified as follows:

Direct examination by Mr. ASHTON:

Q. Mr. Schultze, when you were east a year ago—a year and a half ago—that is to say, during the months of February and March, and probably longer, in 1888, when did you intend returning?

A. I expected to return at first at the end of February; from that time on I was delayed from time to time, and I telegraphed on that I would return at such and such a time, being continuously delayed by negotiations involving over a million of dollars, but I finally left on the 5th of May, and I telegraphed to my chief clerk that I was at last on the way.

Furthermore witness sayeth not.

328 EXHIBIT "H."

Williams. TACOMA, WASH. TER., *May* 14, '88.

J. N. Glover, Esq., Spokane Falls, W. T.

DEAR SIR: Herewith enclosed I hand you draft on Portland for $8,000, endorsed to you for payment to Henry T. Cowley when he and his wife shall have executed and delivered to you quitclaim deed which is herewith enclosed, conveying the 120-acre tract

heretofore in dispute, and which by settlement agreed upon is relinquished to the railroad company; also please find enclosed cash certificate for — blocks and a half in the same tract, which by agreement of settlement were to be conveyed by the company to Mr. Cowley. This certificate you will deliver to Mr. Cowley upon his execution and delivery of the deed by himself and wife.

You will please be careful to make delivery of all papers and receive in return all papers to be delivered from Mr. Cowley through Judge Hagan, his attorney, so that we may be fully protected.

Very respectfully yours,

PAUL SCHULTZ,
Gen'l Land Ag't.

329 TERRITORY OF WASHINGTON, } *ss:*
County of Spokane, }

In the District Court, Fourth Judicial District, Washington Territory, Sitting in and for Spokane County.

H. T. COWLEY, Plaintiff, }
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

To the Hon. W. H. Calkins, judge of the fourth judicial district, Washington Territory:

Pursuant to an order of this court in this action, made on the — day of December, 1888, I, the undersigned, referee, made my report of all proceedings before me and my action thereon, and filed the same in the above-entitled court on the — day of July, 1889, all of which report, except tthe testimony taken in the case, I am informed, was destroyed by fire on or about the 4th day of August last, and I hereby make this substituted report:

1st. I have been attended by the attorneys for the several parties in this action, to wit, Blake & Ridpath, for plaintiff, and Mitchell, Ashton & Chapman, for defendant, and proceeded to a hearing of the matter so referred; that the above and foregoing is the testimony and all of same taken before me, and the following is a copy of my findings of fact and law, submitted in said report, which I make a part of this my substituted report.

I did not preserve copies of the exhibits referred to in the testimony and do not remember their contents.

J. D. HINKLE, *Referee.*

330 In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at Spokane Falls, in and for the County of Spokane.

H. T. COWLEY, Plaintiff, }
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

Report of Referee.

I would further report that I find as facts:

First. That the Northern Pacific railroad (the defendant in this case), on the 29th day of June, 1886, commenced an action in the

district court, fourth judicial district, Washington Territory, sitting in and for Spokane county, against H. T. Cowley, plaintiff in this case, to recover possession of certain lands in complaint in that case described.

Second. That said H. T. Cowley (plaintiff in this case), for answer to complaint in the above-described suit, filed his answer claiming equitable relief thereby, to wit, specific performance of contract of land described in complaint.

Third. That on or about the — day of April, 1887, the firm of Ganahl & Hagan, a law firm composed of Frank Ganahl and A. Hagan, were employed by Cowley to represent him in his defense in the case of the N. P. R. R. Co. *vs* Cowley, under contract whereby they were to receive one-fourth of all money or land recovered by Cowley.

Fourth. That at the November, 1887, term of the district court Emma Thompson was appointed referee to take evidence in the case, and as such referee caused the parties to appear before
331 her at her office, in the city of Spokane Falls, on the 10th day of May, 1888, to take said testimony. The N. P. R. R. Co. appeared by its attorney, J. H. Mitchell, Jr., and the defendant Cowley by Ganahl & Hagan, his attorney-. Upon agreement of parties, taking of testimony was postponed until May 11th, the same being the next day.

Fifth. That upon the said 10th day of May, 1888, Paul Schultze, general land agent of the N. P. R. R. Co. and its duly authorized agent, upon behalf of the company, made a proposition of settlement to Ganahl & Hagan, attorneys for Cowley, of the differences concerning land in dispute in case of R. R. Co. *vs.* Cowley, the proposition being this: The railroad company would give Cowley $8,000 cash and convey to him a tract of land upon which Cowley's improvements were, and comprising about seven and one-half acres; the Co. to retain the balance of the land.

Sixth. That Ganahl & Hagan thereupon informed Cowley of the proposition and what it was and advised him to accept it, as there was an estoppel in his case that would prevent him from recovering the land, in their judgment.

Seventh. That upon the evening of said 10th day of May, 1888, said Schultze, Hagan, and Mitchell went to the residence of Cowley, in the city of Spokane Falls, and there met Cowley and Mrs. Cowley, his wife. The proposition above referred to was discussed by them and an oral agreement of settlement settling their differences was entered into, which agreement was in substance as follows, to wit: The R. R. Co. was to give Cowley $8,000 and a tract of land, upon which Cowley's improvements were, embracing about
332 seven and one-half acres; the R. R. Co. was to retain the balance of the land. Schultze further agreed to give Mrs. Cowley or any person she might designate two lots of land for church purposes; these two lots were to be given by Schultze personally. The R. R. Co. was to pay all costs that had been incurred in the case. The respective attorneys in the case were to prepare all necessary papers for settlement, but nothing was said as to the

kind and character of papers necessary. The $8,000 and papers were to be sent to J. N. Glover, president of the First National bank, Spokane Falls, W. T., who should deliver to Cowley or his attorneys, and it was calculated that the money and papers would arrive about the 16th day of May following. Nothing was said as to the manner in which the case of the R. R. Co. *vs.* Cowley should be disposed —, further than that a disposition of same should be made by attorneys.

Eighth. That on Monday, the 14th day of May, 1888, Schultze secured a draft for $8,000, payable to the order of J. N. Glover; also had prepared a certificate of sale from the N. P. R. R. Co. to Cowley, duly executed by the company, conveying to Cowley the seven and one-half acres mentioned in agreement of settlement; also a plat of said land, and also a quitclaim deed from Cowley and wife to the R. R. Co. for all land claimed by the company in complaint case, R. R. Co. *vs.* Cowley; placed these all in an envelope and sent the same to J. N. Glover. In said envelope was also a letter of instructions to Glover directing him to see Cowley and his attorneys, and upon Cowley signing and executing the quitclaim deed he should turn over and deliver to them the money, certificate of sale, and plat. All of these documents and money was received by
333 said Glover on the 16th day of May.

Ninth. On the 15th day of May, 1888, Cowley went to the office of one of his attorneys, to wit, Hagan, and informed him that he was dissatified with the settlement, and that he desired to employ associate counsel to assist them (Ganahl & Hagan), to which Hagan objected, except they (Ganahl & Hagan) should be paid the amount due them for their fees; whereupon negotiation for settlement of fees was entered into between them.

Tenth. That on the 15th day of May Cowley also sent a telegram to Schultze to the effect that he must have additional time to consider proposition of settlement, which was received by Schultze upon same date, and was answered by him to the effect that there was nothing to consider; settlement had been made, papers and money had been sent.

Eleventh. That upon receipt of money and papers on the 16th day of May, Glover at once took all papers to the office of Ganahl & Hagan, where he found both members of the firm; also Cowley. Glover informed them that he had received all the papers and money. He gave one of the attorneys the papers, and also exhibited to them his letter of instructions. He informed them that the money would be paid as soon as Cowley and wife would execute and deliver the quitclaim deed. He was informed that the matter would be attended to that day, and he would be called upon to pay the money. After Glover left, and upon same day, Cowley and wife refused to execute the quitclaim deed, and have so refused ever since said time. The money is now and has ever since said time been in Glover's hands and ready to be turned over to
334 Cowley upon delivery of quitclaim deed, duly executed.

Twelfth. That on the 17th day of May Cowley wrote and

sent Mitchell and Schultze each a letter to the effect that the proposition of compromise had not been accepted; that Ganahl & Hagan had been discharged as his attorneys and were not authorized to represent him, and all further communications should be made through his attorneys, Blake & Ridpath; which letters were received by them about the 19th day of May, and upon that day they each wrote Cowley to the effect that they would recognize no other attorneys in the case without their charges against counsel were paid and the names of other attorneys substituted by order of the court.

Thirteenth. That on the said 17th day of May Cowley wrote a letter to Ganahl & Hagan and had the same delivered to them, to the effect that he discharged them as his attorneys and had employed other counsel to represent him. Upon same date Ganahl & Hagan wrote and had delivered to Cowley a letter to the effect that they demanded $4,000 for their fee and would consider no less sum, and also that they had, on motion, set case down for taking testimony, to commence on Monday, May 21st.

Fourteenth. That upon the 18th day of May the referee, Emma Thompson, issued a citation to Mitchell, as attorney for the R. R. Co., and Ganahl & Hagan, as attorneys for Cowley, to the effect that on the 21st day of May she would proceed to take testimony in the case of the R. R. Co. *vs.* Cowley, one of which notices is filed herewith and made a part hereof and marked Exhibit —. Thereupon, upon the same day, to wit, May 18th, 1888, said Cowley telegraphed said
335 Mitchell, as such attorney, that he could not take testimony on Monday, as he had changed attorneys. On the same day, in answer thereto, said Mitchell telegraphed said Cowley that he had never arranged for taking testimony on Monday or any time subsequent to May 10th, when, as he said, counsel gave them to understand no taking of testimony would be necessary, and saying that Mr. Schultze, his principal witness, relying on Cowley's word, since broken, had made engagements making it impossible for him to go to Spokane Falls in said case for several weeks, and that the case would not go on until Schultze could go, and he (Cowley) could depend on that, and he added: "If you must fight, you shall have it." Said telegram is filed herewith and made a part hereof and marked Exhibit —.

Fifteenth. That the 21st day of May was the first day of the May, 1888, term of the district court, upon which date a stipulation was entered into by Mitchell, as attorney for the N. P. R. R. Co., and Ganahl & Hagan, as attorneys for Cowley, to the effect that the case of the N. P. R. R. Co. *vs.* Cowley had been settled and compromised, and upon payment to H. T. Cowley or his attorneys for said Cowley of the sum of $8,000 and the delivery to him or to his attorneys — a certificate or contract of deed, duly executed, for seven and one-half acres of land at or near defendant Cowley's house, as agreed upon, judgment for plaintiff then to be entered for the restitution of the premises mentioned in plaintiff's complaint as therein prayed for, and denying the relief prayed for in defendant's answer or

cross-bill at plaintiff's cost; which stipulation was filed in court with the papers in the case of R. R. Co. *vs.* Cowley.

336 Sixteenth. That Ganahl & Hagan executed and signed a receipt as follows, to wit:

"We hereby acknowledge receipt from the Northern Pacific Railroad Company — a certificate of sale in nature of contract to convey to the said H. T. Cowley the land described in the stipulation heretofore made herein as being about seven and one-half acres of land at or near defendant's house, and of the receipt this day from said company of the sum of eight thousand dollars, placed at the First National Bank of Spokane Falls, subject to our order, for said Cowley, as agreed upon, and hereby acknowledge the terms of said stipulation and the settlement therein mentioned to have been fully complied with and full satisfaction made thereof.

Dated May 16, 1888.

GANAHL & HAGAN,
Attorneys for Defendant, H. T. Cowley."

I find the fact to be that Ganahl & Hagan have never received the $8,000, but that that money is the same heretofore mentioned as being in the possession of J. N. Glover and subject to the order of Ganahl & Hagan and Cowley under certain restrictions mentioned.

Seventeenth. That upon the said 21st day of May, 1888, upon filing stipulation and receipt above described, judgment was rendered for plaintiff R. R. Co. and against Cowley for possession of all the land except the seven and one-half acres previously described herein, and the relief prayed for by Cowley was denied.

Eighteenth. That Cowley did not know that the above-described stipulation had been entered into by the attorneys, nor that
337 the receipt set forth had been given, nor that the judgment had been rendered and entered until all had been done, and upon hearing the same he at once entered his objection to such stipulation, judgment, &c., and protested against it, and has so protested ever since said time. This action was instituted to set aside said judgment and decree.

Nineteenth. On the 28th day of February, 1888, Cowley and wife executed and delivered to Albert Hagan, one of the members of the law firm of Ganahl & Hagan, a general power of attorney, under seal, authorizing him to settle and adjust the said suit of N. P. R. R. Co. *vs.* Cowley, and he was empowered by such instrument to execute and deliver all necessary instruments, under seal and otherwise, to settle the same. At about time power of attorney was executed and delivered Cowley also delivered to Hagan a letter or memorandum, in which he stated that there was two propositions of settlement he desired submitted. One was that he would purchase the land claimed by the company for $45,000 and give them the right of way to the property they occupied; the other was to sell the company his claim to the land for $45,000, reserving 15 acres. The above propositions were not submitted to Hagan, and

in fact no other proposition for compromise. Nothing has ever been said since said time between Cowley and Hagan concerning said power of attorney. Hagan never informed the R. R. Co. that he had a power of attorney, but informed them that he had authority to settle the case. Said power of attorney is hereto attached, marked Exhibit "X," and made part hereof.

Twentieth. That upon the 21st day of May, 1888, Ganahl & Hagan were the duly authorized and acting attorneys for
338 Cowley in case N. P. R. R. Co. *vs.* Cowley, and had full power to act as such.

Twenty-first. I further find that Cowley did not directly authorize Ganahl & Hagan to enter into the above-described stipulation and to consent to judgment, but that the stipulation and judgment was only incidental to the contract of settlement and substantially embodied the same terms, and that by reason of said settlement and the general powers of attorney therein, and the power of attorney executed and delivered to Hagan and their general powers as attorneys in the case, they were authorized to act in the manner they did.

Conclusions of law deduced from the foregoing:

First. That the said H. T. Cowley, plaintiff in this case, is not entitled to the relief asked for in the complaint herein.

Second. That the order and decree in the case of the Northern Pacific Railroad Company *vs.* H. T. Cowley be, and the same are hereby, declared to stand and remain in force.

Third. That the Northern Pacific Railroad Company have judgment for its costs herein.

J. D. HINKLE, *Referee.*

339 In the Superior Court of the County of Spokane, State of Washington.

H. T. COWLEY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. } No. 2283.

Petition for Removal to Circuit Court of the United States.

To the Hon. R. B. Blake, judge of the superior court of the county of Spokane, State of Washington:

Your petitioner, the Northern Pacific Railroad Company, the defendant in the above-entitled action, respectfully alleges:

First. That your petitioner is a corporation created, organized, and existing under and by virtue of an act of the Congress of the United States entitled An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route, approved July 2, 1864.

Second. That this action was commenced in the district court of the fourth judicial district of Washington Territory, holding terms

at Spokane Falls, in and for the county of Spokane, and was there pending on the 11th day of November, 1889, when said Territory became a State under the authority granted by the enabling act approved February 22, 1889.

340 Third. That your petitioner, the Northern Pacific Railroad Company, is not a citizen of the State of Washington, nor has it been such citizen at any time since the commencement of this action; that said plaintiff is now and ever has been since the commencement of this action a citizen of the State of Washington.

Fourth. That this action brings before this court a controversy arising between citizens of different States.

Fifth. That this is a suit of a civil nature, arising under the laws of the United States; that the same is now pending in a State court, and is properly within the jurisdiction of the circuit court of the United States for the ninth judicial circuit, district of Washington.

Sixth. That the matter in dispute in this action exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

Wherefore your petitioner prays that an order may be entered in this court removing this action into the circuit court of the United States for the ninth judicial circuit, district of Washington, together with all files and records relating thereto, for proceeding in said action before that court.

NORTHERN PACIFIC RAILROAD COMPANY,
By S. G. RAMSEY, *Its Superintendent.*

341 STATE OF WASHINGTON, } ss:
County of Spokane, }

S. G. Ramsey, being first duly sworn, upon oath deposes and says that he is the superintendent of the Northern Pacific Railroad Company, the petitioner herein; that he has read the foregoing petition, knows the contents thereof, and believes the same to be true.

S. G. RAMSEY.

Subscribed and sworn to before me this 6th day of January, 1890.

W. O. CHAPMAN,
Notary Public.

342 [Endorsed:] 2283. H. T. Cowley *vs.* N. P. R. R. Co. Petition for removal to U. S. superior court. Filed Jan. 6, 1890. J. M. Armstrong, clerk, by —— ——, deputy.

343 In the Superior Court of the County of Spokane, State of Washington.

H. T. COWLEY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

To H. T. Cowley and W. M. Ridpath, his attorneys:

You and each of you are hereby notified that there has been this day filed in the above-entitled action, in the office of the clerk of the above-entitled court, a request (a copy of which is hereto attached), and that the defendant proposes to remove the above-entitled cause in accordance with said request, having this day filed with said request a bond, conditioned as required by law, with good and sufficient sureties, in the sum of $500.

MITCHELL, ASHTON & CHAPMAN,
Attorneys for Defendant.

Dated January 6th, 1890.

344 [Endorsed:] 2283. H. T. Cowley *vs.* N. P. R. R. Co, Notice of removal. Filed Jan. 7, 1890. J. M. Armstrong clerk, by A. S. Johnston, deputy.

345 In the Superior Court, County of Spokane, State of Washington.

H. T. COWLEY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. } Bond.

Know all men by these presents that we, The Northern Pacific Railroad Company, the defendant in the above-entitled action, by S. G. Ramsey, its division superintendent, as principal, and A. A. Newbery and C. B. King, residents of Spokane county, State of Washington, as sureties, are held and firmly bound unto H. T. Cowley, the plaintiff in the above-entitled action, *their* heirs, executors, administrators, and assigns, in the sum of five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, the said Northern Pacific Railroad Company hereby binds itself, its successors and assigns, and we, the said sureties, hereby bind ourselves and our and each of our heirs, executors, and administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of January, 1890.

346 The conditions of the above and foregoing obligations are such that—

Whereas the said Northern Pacific Railroad Company has filed a petition in the above-entitled court praying that the above-entitled action and all the files, records, and further proceedings therein

may be transferred to the circuit court of the United States for the ninth judicial circuit, district of Washington:

Now, therefore, if the said Northern Pacific Railroad Company shall enter in said circuit court of the United States, on the first day of its next session, a copy of the record of the above-entitled suit, and shall pay or caused to be paid all costs that may be awarded by the said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to be and remain in full force and effect.

NORTHERN PACIFIC RAILROAD COMPANY,
By S. G. RAMSEY,
Its Superintendent. [SEAL.]
A. A. NEWBERY. [SEAL.]
C. B. KING. [SEAL.]

Signed, sealed, and delivered in the presence of—
W. O. CHAPMAN.
O. M. KENT.

347 STATE OF WASHINGTON, }
County of Spokane, } *ss:*

A. A. Newbery and C. B. King, the sureties in the above and foregoing bond, being first duly and severally sworn, each for himself doth depose and say that he is a resident and freeholder of the county of Spokane, State of Washington, and is worth the sum of five hundred dollars over and above all just debts and liabilities and exclusive of property exempt from execution.

A. A. NEWBERY.
C. B. KING.

Subscribed and sworn to before me this 6th day of January, 1890.

W. O. CHAPMAN,
Notary Public.

348 [Endorsed:] 2283. H. T. Cowley *vs.* N. P. R. R. Co. Bond. Approved and filed January 6, 1890. J. M. Armstrong, clerk, by —— ——, deputy. Recorded, pages 554–6, Journal G.

349 In the Superior Court of Spokane County, State of Washington.

H. T. COWLEY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The petition of the abovenamed Northern Pacific Railroad Company, defendant herein, by way of request, for the removal of this suit into the circuit court of the United States for the district of Washington, in the ninth judicial circuit, in pursuance of the laws of the United States relating to the removal of suits from the State

courts, having been read and filed and the security offered by said defendant, according to the requirements of said laws, having been filed: Now, on motion of J. H. Mitchell, Jr., attorney for the said defendant, it is hereby—

Ordered that said security be accepted and the said suit be removed into the circuit court of the United States for the district of Washington, in the ninth judicial circuit, next to be holden within the said district of Washington, together with all files and records relative thereto, for further proceedings therein before said circuit court, and that in the meantime all further proceedings in said action in this court shall be stayed, and that no further pro-
350 ceedings be had in said suit in this court.

Witness J. M. Kinnaird, judge of the above-entitled superior court of Spokane county, State of Washington, this 27th day of March, 1890.

[Endorsed:] No. 2283. In the superior court of Spokane Co., Wash. H. T. Cowley, plaintiff, *vs.* N. P. R. R. Co., def't. Order of removal of case to circuit court of U. S. Filed Mar. 27, 1890. J. M. Armstrong, clerk, by A. S. Johnston, dept. Recorded, page 128, Journal H.

351 In the Superior Court of Spokane County, State of Washington.

H. T. COWLEY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

To J. M. Armstrong, clerk of the above-entitled superior court:

Your attention is hereby called to the fact that on the 27th day of March, 1890, an order was entered in the above-entitled action directing the removal of said action into the circuit court of the United States for the ninth judicial *district*, district of Washington, next to be holden within the said district of Washington, together with all files and records relating thereto, for further proceedings therein before said circuit court. The next term of the said circuit court to be holden within the said district of Washington convenes at the city of Olympia, this State, on the first Monday in April, April 7th, 1890, in pursuance of the provisions of the act of Congress approved February 22, 1889, providing for the admission of the State of Washington.

See section 21 of said act as contained in Statutes of the United States passed at the 2nd session, 50th Congress, 1888–1889, pages 676 to 684.

Your attention is also called to the provisions of section 23
352 of said act relative to the transfer to the circuit court of the United States of all files, records, and proceedings relating to cases capable of being transferred to such court.

If you have not, as custodian of the records and files in this cause, already complied with the request in the petition of the defendant heretofore filed and with the order of the court and the provisions

of the law heretofore referred to, you will please do so at once, as, under the provision of section 3 of the act of Congress approved August 13, 1888, as contained in Statutes of the United States passed at the first session of the 50th Congress, 1887, 1888, chapter 866, pages 433 to 437, the record in this cause, in conformity with the conditions of the bond heretofore filed by defendant, must be entered in the circuit court of the United States on the first day of its next session.

Under the provisions of the law first referred to you will in making said transfer, as present custodian of the records in this action, cause the original papers and pleadings on file to be transferred by transmitting the same to A. Reeves Ayres, clerk of the circuit court of the United States for the district of Washington, at Olympia, Washington, certifying them to be such original files, pleadings, and records and all of the same, and also accompany said transfer with a certified copy or transcript of all orders entered of
353 record and all entries upon the journal in your custody pertaining in any way to this cause, properly certifying them to be such orders and entries and to be all entries appearing upon such records or upon the journal in your custody pertaining to said cause.

You will please furnish the undersigned, as attorneys of said defendant, a statement of the costs of such transfer and certification, and the same will be promptly paid.

MITCHELL, ASHTON & CHAPMAN.

Tacoma, Wash., March 26, '90.

354 [Endorsed:] 2283. H. T. Cowley *vs.* N. P. R. R. Co. Instructions to clerk. Filed Mar. 29, 1890. J. M. Armstrong, clerk, by A. S. Johnston, deputy.

355 In the District Court of the Fourth Judicial District of Washington, Holding Terms at Spokane Falls, in and for Spokane County.

H. T. COWLEY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. } Journal Entry.

The motion of defendant for confirmation of the report of the referee and the motion of plaintiff to set aside said report coming up for hearing before the judge of the above-entitled court, at chambers, this 23d day of October, 1889, in pursuance of notice served on attorneys for plaintiff by attorneys for defendant calling said motions up for hearing, and both parties appearing by counsel, the plaintiff by W. M. Ridpath, and the defendant by J. H. Mitchell, Jr., the plaintiff, by his attorneys, moves for a continuance of said hearing, the motion being based upon an affidavit of W. M. Ridpath, produced in support thereof; and it appearing from said affidavit that the findings of fact and conclusions of law of the referee were de-

stroyed by fire, and it also appearing that a properly certified copy could be substituted therefor—

It is ordered by the judge that the hearing of said motions be, and hereby is, continued until Thursday, the 31st day of October, 1889, at the hour of 10 o'clock a. m., or such time as counsel
356 can be heard.

And leave is hereby given to substitute a properly certified copy of said findings of fact and conclusions of law, and that said substitution be made in accordance with the order or rule of the court heretofore made and now in force with regard to the substitution of papers destroyed by fire.

[Endorsed:] District court, Spokane Falls. 2283. H. T. Cowley *vs.* N. P. R. R. Co. Journal entry. Recorded, Journal G, page 248.

357 I, J. M. Armstrong, county clerk of Spokane county and *ex officio* clerk of the superior court of said county, do hereby certify that the annexed papers, to wit, *and* precipe, summons and return; receipt on file shows that Houghton, Graves & Jones *have* complaint August 2, 1888; sheriff's amended return, order, interrogatories, summons and return, demurrer, motion, facts, facts to be found, answer, Exhibit "A" — answer, reply, plaintiff's brief on motion to strike, brief of defendant on motion to strike, motion to strike, motion to set aside report of referee, motion, affidavit, affidavit of service, notice of calling up for hearing, testimony complete, substituted report of referee, petition for removal to circuit court of the United States, bond for removal, notice of removal, order of removal of cause to circuit court of U. S. and instructions to clerk, journal entry, are all the original papers in the above-entitled case; *that* I further certify that I have prepared the foregoing copy of journal entries and entry on appearances docket and fee book as the same appear of record in my office, and that the same is a true and perfect transcript of said record, and that the said papers and said transcript comprise all the file, records, and proceedings in said cause.

I further certify that as such clerk I am the custodian of the records of the district court of the fourth judicial district of
358 the Territory of Washington, holding terms at Spokane Falls, in the county of Spokane.

Witness my hand and the seal of the said superior court,
[SEAL.] at my office, in Spokane Falls, this 30th day of August, 1890.

J. M. ARMSTRONG, *Clerk.*

[Endorsed:] Filed Sept. 1, 1890, in the U. S. circuit court. A. Reeves Ayres, clerk, by S. A. Wells, deputy.

359 In the Circuit Court of the United States for the District of Washington, Eastern Division Thereof.

H. T. COWLEY, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD CO., Defendant.

Know all men by these presents that we, H. T. Cowley and J. D. Maxwell and J. B. Blalock, all of the city and county of Spokane and State of Washington, are hereby firmly bound unto the above-named Northern Pacific Railroad Company in the sum of one thousand dollars ($1,000.00); for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of June, A. D. 1891.

Whereas the above-named H. T. Cowley has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the district of Washington, in the eastern division thereof:

360 Now, therefore, the condition of this obligation is such that if the above-named H. T. Cowley shall prosecute said appeal to effect and answer all damages and costs if he fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

H. T. COWLEY. [SEAL.]
J. D. MAXWELL. [SEAL.]
J. B. BLALOCK. [SEAL.]

Witnesses:
C. H. WOLF.
GEORGE TURNER.

STATE OF WASHINGTON, } ss:
County of Spokane, }

J. B. Blalock and J. D. Maxwell, being first duly sworn, each for himself and not one for the other, deposes and says that he is a citizen of the United States over the age of 21 years and a resident of the county of Spokane and State of Washington; that he is worth the sum of $1,000.00 over and above all debts and liabilities and property exempt from execution.

J. B. BLALOCK.
J. D. MAXWELL.

Subscribed and sworn to before me this 6th day of June, 1891.
[SEAL.] CHARLES H. WOLF,
Notary Public in and for the State of Washington,
Residing at Spokane.

361 [Endorsed:] Circuit court of the United States. H. T. Cowley, plaintiff, *vs.* N. P. R'y Co., defendant. Filed June 9, 1891. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy. I

hereby approve the within bond this 8th day of June, 1891. C. H. Hanford, United States district judge. Turner & Graves, attorneys for pl'ff.

362 In the Circuit Court of the United States, District of Washington, Eastern Division, Terms at Spokane.

H. T. COWLEY, Complainant,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Respondent.
} Final Decree Made May 20, 1891.

This cause came on to be further heard at this term and was argued by counsel, and the court, having heretofore taken the determination of the cause under advisement, now, upon consideration thereof, it is, this 20th day of May, 1891—

Ordered, adjudged, and decreed that there is not sufficient equity in plaintiff's bill to entitle him to the relief prayed for therein and he should not have or further maintain his action in this cause, and that his said bill be, and hereby is, dismissed, and that the respondent do have and recover of and from the plaintiff its costs and disbursements in this action, taxed at $51.40.

Whereupon plaintiff, by his attorneys, in open court, prayed an appeal of this cause to the Supreme Court of the United States; which said appeal is hereby and now allowed.

C. H. HANFORD, *Judge.*

363 UNITED STATES OF AMERICA,
District of Washington, Eastern Division Thereof.

I, A. Reeves Ayers, clerk of the circuit court of the United States in and for the district of Washington, eastern division thereof, do hereby certify the writing hereto attached to be a true manuscript of the record, proceedings, and exhibits in case No. 13, of H. T. Cowley, plaintiff, against The Northern Pacific Railroad Company, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at my office, in the city of Spokane, in said district, in the eastern division thereof, this first day of October, in the year of our Lord one thousand eight hundred and ninety-one.

A. REEVES AYERS,
Clerk of said Court,
By S. A. WELLS, *Deputy.*

Endorsed on cover: Case No. 14,925. Washington C. C. U. S. Term No., 673. H. T. Cowley, appellant, *vs.* The Northern Pacific Railroad Company. Filed November 7, 1891.

FILED.
APR 30 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 342.

H. T. Cowley,
Appellant.
VS.
Northern Pacific Railroad Company,
Respondent.

Appeal from the Circuit Court of the United States for the District of Washington, Eastern Division.

BRIEF OF APPELLANT.

LEWIS ABRAHAM,
Counsellor and Solicitor for Appellant.

GEORGE TURNER,
FRANK GRAVES,
R. B. BLAKE AND
W. M. RIDPATH,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

H. T. Cowley,
Appellant.

VS.

Northern Pacific Railroad Company,
Respondent.

Appeal from the Circuit Court of the United States for the District of Washington, Eastern Division.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This case was originally begun in the District Court of the Territory of Washington in and for the Fourth District thereof, holding terms in the City of Spokane, and was a proceeding under the territorial

statute to set aside and vacate the judgment rendered in a case brought by said railroad company against appellant Cowley, in said court. That action was brought by the railroad company for the possession, under the statutes of the territory, of one hundred and twenty (120) acres of land within the limits of Spokane For answer to the complaint, in that action, Cowley set up a contract of purchase for the land made between the railroad company and himself, alleging that he had complied, and was ready to comply, with the terms of his contract of purchase, and had gone into possession of the land pursuant thereto, and had made lasting and valuable improvements thereon to the amount of fifteen hundred ($1500,00) dollars, and demanded specific performance of his contract. This answer or counterclaim was denied by the railroad company in its reply and the case being thus at issue, was referred to a referee to take evidence. At this stage of the case the attorneys for Cowley and the attorneys for the railroad company entered into an unauthorized stipulation of settlement upon which they procured the court, without Cowley's knowledge or consent, to enter up judgment, dismissing his counterclaim, and denying him all relief therein prayed for, and giving the railroad company the possession of all of the land in controver-

sy, except about seven and one-half [7½] acres thereof. This judgment is set out in full in plaintiff's petition in this case, and is found at pages 4 and 5 of the printed record.

It will be observed that the original action was an equitable one in its character, having been made so by defendant's counterclaim. The railroad company's legal title was not denied, and the controversy was wholly upon Cowley's counterclaim. The law in Washington Territory then, as now, was administered under a code which abolished all distinctions in matters of form and practice between suits in equity and actions at law, and both equity and law were administered in the same action by the same court. See following statute: "There shall be in this Territory hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil action." *Section 2, Code of Wash., 1881*, page 35

The following is the statute under which this proceeding was begun, *Sections 436—444*, inclusive, *Code of Washington, 1881*, pages *110, 111 and 112*.

SEC. 436. The district court in which a judgment has been rendered, or by which, or the judge of which, a final order has been made, shall have power after

the term at which such judgment or order was made, to vacate or modify such judgment or order:

1. By granting a new trial for the cause, within the time and in the manner, and for any of the causes prescribed by the sections relating to new trials.

2. By a new trial granted in proceedings against defendant served by publication only as prescribed in section sixty-seven.

3. For mistakes, neglect or omission of the clerk, or irregularity in obtaining a judgment or order.

4. For fraud practiced by the successful party in obtaining the judgment or order.

5. For erroneous proceedings against a minor person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings.

6. For the death of one of the parties before the judgment in the action.

7. For unavoidable casualty, or misfortune preventing the party from prosecuting or defending.

8 For error in a judgment shown by a minor, within twelve months after arriving at full age.

SEC. 437. When the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after the term at which the verdict, report of referee, or decision was rendered or made, the application may be made by petition, filed

as in other cases, not later than the second term after the discovery, on which notice shall be served and returned, and the defendant held to appear as in an original action. The facts stated in the petition shall be considered as denied without answer. The case shall be tried as other cases by ordinary proceedings, but no motion shall be filed more than one year after the final judgment was rendered.

SEC. 438. The proceedings to correct mistakes or omissions of the clerk or irregularity in obtaining a judgment or order, shall be by motion served on the adverse party, or on his attorney in the action, and within one year; and when made to vacate a judgment because of irregularity in obtaining it, must be made on the second day of the succeeding term.

SEC. 439. The proceedings to obtain the benefit of subdivisions four, five, six, seven and eight of section 436, shall be by petition, verified by affidavit, setting forth the judgment or order, the facts or errors constituting a cause to vacate or modify it, and the facts constituting a defense to the action, if the party applying was a defendant; and such proceedings must be commenced within one year after the judgment or order was made, unless the party entitled thereto be a minor or person of unsound mind, and then within one year from the removal of such disability.

440. In such proceedings the party shall be

evidence, which is set out in full in the record, and made his findings of fact and stated his conclusions of law thereon, which are found at pages 167 to 172, inclusive, of the record. These findings of fact were adopted by the court below, and are set forth in its opinion as the basis thereof, except findings numbered 19 and 21, which were rejec ed as not being supported by the evidence. See opinion of court at pages 28 to 36, inclusive.

The referee's report having been filed in the territorial court, both parties moved the court to set aside or modify certain findings of fact and conclusions of law therein contained, which motions are found at pages 26 and 27 of the record. While these motions were still pending and undisposed of in the territorial court, the cause was removed to the Circuit Court of the United States on motion of the respondent, under the provisions of the Enabling Act by which the Territory of Washington had become the State of Washington. See petition and order of removal, pages 174, 175 and 176 of the record. It will be observed that while the case was in the territorial court it proceeded strictly in accordance with the statute under which it was brought, and especially according to Sections 430, 440, 441 and 442 of that statute. The only question

submitted to the referee for determination was whether there were sufficient facts to warrant the setting aside of the judgment, the question of the validity of Cowley's defence to the original action not having been submitted to him at all. The pertinency of these observations lies in our contention that this was a statutory proceeding in its inception, which contention the court below persistently refused to recognize, and insisted on the proposition that it was always a bill in equity.

The case was submitted to the court upon said motions to set aside and modify the report of the referee, and upon the evidence, and after consideration of the same, the appellant's bill was dismissed and judgment rendered against him for costs, form which, this appeal is prosecuted. Record, page 180.

The findings of fact as adopted and set forth in the opinion of the court are mainly supported by the evidence. Some of them, however, are not as full and strong in favor of appellant as the evidence warrants; notably, the seventh. This finding, which purports to set forth the terms of the tentative agreement made between Cowley and Schultze for the railroad company fails to include therein some material provisions. The evidence shows that a right of way for taking

water over the land to be given Cowley was to be included; also a right of pasturage was reserved by Cowley. The evidence further shows that the boundaries of the seven and one-half acres of land to be retained by Cowley were not definitely understood or agreed upon by the parties at that time. Nor does the evidence show that it was agreed that the attorneys in the case were to prepare all necessary papers for the settlement. These negotiations took place on May 10th, 1888, at the residence of Cowley, and were carried on between him and Mr. Schultze, land agent of the company, and were not between the attorneys at all, although they were present. The propositions were not reduced to writing, although Mr. Schultze was requested to do so, and the tentative settlement was to be closed by the execution of deeds which were to be prepared in Tacoma and sent on by Mr. Schultze to Spokane. Nothing was said about carrying the agreement into effect by judgment of the court. That method was adopted purely as an after-thought, after the attorneys had been notified that Mr. Cowley refused to close the deal, and at the very time when the referee was supposed to proceed with the taking of testimony on the merits of the case.

Finding number 20, to the effect that, at the time of the rendition of the judgment, Ganahl & Hagan were the duly authorized and acting attorneys of Cowley and had full power to act as such, is not supported by the evidence. Finding number 13 is to the effect that Cowley had discharged them from the case on May 17th, prior to the entry of the judgment on the 21st of May.

The circuit court held that the merits of the case upon the question of setting aside the judgment were with appellant, but was of opinion that he had mistaken his remedy in failing to proceed under the statute. The court says: "However, there was only an understanding between the parties as to the terms upon which the contract should be concluded, and there was not a contract actually made and concluded.

"Now, that agreement, even if it were binding in law and equity upon Mr. Cowley, has never been executed, never has been carried into effect. It has never been performed on the defendant's part so as to entitle it to any judgment in the district court in the original case, and it is not by virtue of any executed agreement between the parties that the railroad company can claim that the judgment was properly entered. The stipulation that was signed by Ganahl & Hagan,

as attorneys for Mr. Cowley, was not only unauthorized, but it was made in defiance of his known wishes in the matter. The judgment rendered on that stipulation was, therefore, improperly rendered and it was unjust. I have no hesitation in saying that if the judgment were moved against in any proper way, it should, as a matter of right, be vacated. But is the plaintiff entitled to such relief in this separate suit in equity? This I find to be the serious and difficult question in the case." R., p. 32–3.

We may add that the evidence and findings both show that the attorney for the railroad company, Mitchell, knew that Ganahl & Hagan were unauthorized to enter into the stipulation, and that the same was made without Cowley's knowledge or consent. In order thoroughly to understand the signification and importance of this transaction, the cross-examination of Mitchell, beginning at page 135 and ending at page 142, and also that of the witness, Hagan, beginning at page 107 and ending at page 117, should be read.

ASSIGNMENT OF ERRORS.

Manifest errors appear in the record in this cause in the following particulars:

First: The court erred in dismissing plaintiff's

bill and rendering judgment against him for costs, whereas, the judgment should have been in favor of plaintiff sustaining his complaint and setting aside the judgment therein mentioned and described.

Second: The court erred in denying plaintiff's motion to modify the report of the referee by striking out his conclusions of law to the effect that the plaintiff is not entitled to the relief asked for in the complaint, and that the judgment therein mentioned and described ought to stand and remain in force, and that the railroad company should have judgment for costs.

Third: The court erred in refusing to sustain plaintiff's bill and enter judgment in his favor, anulling and vacating the judgment therein mentioned and described.

Fourth: The court erred in denying plaintiff's motion to modify the seventh finding of fact reported by the referee.

Fifth: The court erred in denying plaintiff's motion to strike out finding of fact number 20 as reported by the referee.

Sixth: The court erred in holding that this case, in its inception, was not a statutory proceeding brought under the statutes of Washington for the vacation and modification of judgments.

Seventh: The court erred in holding that the judgment sought to be annulled in this proceeding was a judgment in an action at law.

Eighth: The court erred in holding that a court of equity will not entertain jurisdiction to set aside a fraudulent judgment while the remedy by a motion is still open to complainant.

Ninth: The court erred in holding that the equity jurisdiction of the federal courts is or may be modified or curtailed by state laws providing for concurrent or supposed exclusive remedies for the vacation of judgments.

Tenth: The court erred in holding that appellant had mistaken his remedy.

POINTS AND AUTHORITIES.

I.

THIS WAS A PROCEEDING IN THE TERRITORIAL COURT UNDER THE STATUTE.

We call the court's attention to the statute.

Code of Washington, 1881, ps. 110-1-2.

It will be observed that when the proceeding under the statute is one to correct some irregularity merely, as the mistake or omission of the clerk, or other irregularity in obtaining a judgment or order, the appli-

cation is by motion to be served on the adverse party within one year, and the motion must be made on the the second day of the succeeding term. *Code of Washington, Section 438.*

But when the proceeding is to set aside a judgment under the fourth, fifth, sixth, seventh and eighth subdivisions of section 436, among which is the ground of fraud, the one relied upon in this case, the proceeding must be begun by petition "verified by affidavit setting forth the judgment or order, the facts or errors constituting a cause to vacate or modify it", and facts showing merits of original action or defence, as the case may be. Section 439. In such case the adverse party must be brought into court as in an ordinary action and the "pleadings shall be governed by the principles and issues made up by the some form, and *all the proceedings conducted in the same way*, as near as may be as in the original action by ordinary proceedings". Section 440.

Here is the warrant, we submit, for every step taken by Cowley in bringing this case in the form in which it was originally brought. It was brought under the statute. No statutory element is left out on the one hand, and, on the other, nothing more than

the statute requires was put in the petition. It is true, the proceeding is entitled Cowley vs. The N. P. Railroad, and this, we submit, is according to the spirit of the statute and the only proper title that could have been ad opted for the proceeding. It is not a motion or a step in the original cause, but is an independent proceeding begun after the term at which the judgment was rendered. This is apparent from an examination of the statute. The summons in this case was served on July 21st, 1888.

Louisiana has a similar statute to the one under consideration. The Louisiana law was under consideration by this court in the cases of *Barrow vs. Hunton*, 99 U. S. p. 80, and *Gaines vs. Fuentes*, 92, U. S. p. 10, and those cases, we submit, are conclusive of the one at bar. In those cases it is held that where the proceeding is brought on the ground of irregularity in matter of form, the federal courts would have no jurisdiction.

"Otherwise," says the court, "the Circuit Courts of the United States would become vested with power to control the proceedings in the State courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different states Such a result would be totally inadmissable.

"On the other hand, if the proceedings are tanta-

mount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and according to the doctrine laid down in *Gaines vs. Fuentes*, 92 U. S. 10, the case might be within the cognizance of the Federal courts The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the state courts; and in the other class, the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof". *Barrow vs. Hunton, Supra.*

II.

THE PETITION A BILL IN EQUITY.

Even though it should be held that the court below was right in its opinion that this was not a proceeding under the statute, but was a bill in equity, and was brought as such, in the territorial court, still, we submit, that the bill should not have been dismissed on account of the existence of the statutory remedy. It is well settled that the principles which govern the

equity jurisdiction of the United States courts are of uniform application in every state of the Union, and they cannot be abridged or interfered with by state legislation While state laws affecting primary rights of persons may create new equities which the Federal courts will enforce, state laws which restrain or limit equitable rights, either by denying the right or limiting the remedy, are ineffective to limit the powers of the United States courts. This is well settled by a long line of ajudicated cases.

Barbour vs. Barbour, 21 Howard, 582.

Case of Broderick's Will, 21 Wallace, 503.

Howard vs. Challen, 110 U. S. 15.

McConiachy vs. Wright, 121 U. S. 201.

Reynolds vs. Crawfordsville Bank, 112 U. S. 405.

Payne vs. Hook, 7 Wallace, 425.

Barrow vs. Hunton, 99 U. S. 80.

Gaines vs. Fuentes, 92 U. S. 10.

Marshall vs. Holmes, 141 U. S. 589.

It follows, therefore, if this suit had been brought as an original suit in the Federal Court, it would have been no answer to the equitable case made, to say that under the laws of the state, another and a different remedy had been provided. The equitable jurisdic-

tion of the courts of the United States cannot be limited by laws of the states limiting or prescibing the jurisdiction of the state courts.

The "legal remedy" that will defeat the equitable jurisdiction of the United States courts must have existed at the time the judiciary act was passed in 1789 and the fact that after that date a state legislature may have provided such a remedy will not have that effect.

McConiachy vs. Wright, 121 U. S. 201.

III.

THE PETITION STATES CAUSE OF ACTION.

The petition or complaint in this case was tested in the territorial court by respondent's demurrer to the effect that the same does not state facts sufficient to constitute a cause of action. This demurrer was overruled by the court and the petition adjudged to be sufficient. Record 9. The question, then, of the sufficiency of the petition was *res adjudicata* when the case was removed to the Federal court

Duncan vs. Gegan, 101 U. S. 810.

Ksng vs. Worthington, 104 U. S. 50.

Suppose, however, that it be conceded that the petition was inartificially drawn and that it is neither a bill in equity, nor properly drawn as a petition under

the statute, but rather a mingling of the two, and yet stating facts sufficient to constitute a cause of action, and sufficient to entitle the plaintiff to *some* relief of *some* kind or character. In such a state of the case what would the territorial court have done? Manifestly it would have overruled the demurrer, as it did, and decreed the proper remedy; and this under the almost universal rulings of the state courts where the reformed code of proceedure has been adopted. "It may be regarded," says Mr. Pomeroy, "as the settled rule, that if a plaintiff has set forth facts constituting a cause of action, and entitling him to some relief, either legal or equitable, his action should not be dismissed because he has misconceived the nature of his remedial right, and has asked for a legal remedy when it should have been equitable, or for an equitable remedy when it should have been legal. *Pom. Rems. and Rem. Rights*, [1st Ed.] Section 71. See also Secs. 70, 71, 72 and 73, and particularly note to section 70.

Wright vs. Wright, 54 N. Y. 437.

White vs. Lyons, 42 Cal. 282.

Grain vs. Albridge, 38 Cal. 514.

The case having been removed by the respondent

to the United States Circuit Court, and conceding that the same was found there to be in the condition above referred to as to the petition and pleadings, that court could not properly dismiss the petition, but at most would have ordered a re-pleader.

Dillon on Removal of Causes, Sections 81, 82 and 83.

The case having been removed must be tried by the circuit court as though it had been originally begun there. Section 3 *Act March 3rd, 1887*, as corrected by *Act of August 13th, 1888*. Printed in *Dillon on Removal of Causes*, p. 43.

Equity causes removed from state courts proceed as equity causes in the United States courts, and are to be decided by principles of equity of uniform and general application.

Dillon on Removal of Causes, Section 82.

Neves vs. Scott, 13, How., 268.

If the cause is properly removed, the party removing it is entitled to any advantage which the practice and jurisprudence of the Federal courts give him.

King vs. Worthington, 104 U. S. 50.

Where a case has been removed from the state court to a Federal court on motion of defendant, he cannot move its dismissal on the ground that it was

improperly brought in the original court, such an objection being now immaterial; neither can he attack the jurisdiction of the court to which it has been removed on his own motion.

Edwards vs. Conn. Mu. Life Ins. Co. 20 Fed. Rep. 452.

IV.

EQUITY WILL ENFORCE STATUTORY RIGHT TO HAVE JUDGMENT SET ASIDE.

Aside from the question as to whether a court of equity will set aside and vacate a judgment at law on account of fraud, and without regard to whether the judgment in question was a judgment at law or a decree in equity, we submit that the equity jurisdiction exercised by the Federal courts will enforce Cowley's statutory right to have this judgment vacated. An eminent author states the law thus:

"But while state legislation cannot thus influence the jurisdiction *negatively* so as to narrow it, it may operate affirmatively so as to at least indirectly enlarge it. It has accordingly been repeatedly held that while the equitable jurisdiction cannot be narrowed or limited by any state legislation or judicial action, on the other hand, if equitable primary rights, interests or estates have been enlarged, or if entirely new equitable prim-

ary rights or interests have been created by state laws such enlarged or new rights will necessarily come within the equitable jurisdiction of the National courts and may be protected, maintained and enforced in appropriate suits by proper remedies" *1 Pom. Eq. Jur.*, [1st Ed.] Sec. 293 and cases cited.

In *Case of Broderick's Will*, 21 Wall. 503, it was held: "That alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the Circuit courts of the United States, so long as the equitable rights themselves remain, yet enlargements of equitable rights may be administered by the circuit courts as well as by the courts of the state." Page 520.

The *Broderick Will Case* is cited, and the doctrine there enunciated is applied by this Court in *Holland vs. Challen*, 110 U. S.

In *Reynolds vs. First National Bank*, 112 U. S. 405, it is said:

"The appellant next complains of the decree rendered by the Circuit court, and his first objection is that the court had no jurisdiction to quiet the title of the appellee, as against a deed averred by the bill, and not denied by the answer, to be void on its face. The contention is that a deed void on its face is not a cloud

upon the title, and a claim of title under it is no ground for the interference of a court of equity. This objection is not tenable. It may be conceded that the legislature of a state cannot directly enlarge the equitable jurisdiction of the circuit courts of the United States. Nevertheless, an enlargement of equitable rights may be administered by the circuit courts as well as by the courts of the states. *Case of Broderick's Will*, 21 Wall. 520. And, although a state law cannot give jurisdiction to any Federal court, yet it may give a substantial right of such a character that, when there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, admiralty or of common law." *Ex parte McNeil*, 13 Wall 243.

In *Ex parte McNeil*, 13 Wall, 243, the court, after holding that a state law cannot confer jurisdiction on a Federal court says:

"The statute in such cases does not confer jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our National jurisprudence. A party forfeits nothing by

going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal in the same locality."

Gaines vs. Fuentes, 92 U. S. 10.

Barrow vs. Hunton, 99 U. S. 80.

1 Foster Fed. Prac., Sec. 7.

V

EQUITY WILL VACATE JUDGMENTS AND DECREES OBTAINED BY FRAUD.

1. We make the contention that equity, in the exercise of its ordinary jurisdiction, will vacate and set aside judgments at law obtained through fraud, accident or mistake. Mr. Pomeroy says:

"Accident is also one of the grounds for the exercise of the most important jurisdiction with respect to actions and judgments at law. Where the defendant in an action at law has a good defence on the merits, which he is prevented by accident from setting up or making available, without any negligence or inattention on his part, and judgment is recovered against him, equity will exercise its jurisdiction in his behalf by enjoining further proceedings to enforce the judg-

ment, or *by setting it aside so that a new trial can be had on the merits.* In many states, especially in those which have adopted the reformed proceedure, this particular relief is usually obtained by means of a motion for a new trial, and the necessary occasions for a resort to equity have been lessened; the equitable jurisdiction, however, has not been abrogated even in those states, and it is constantly invoked in the other commonwealths."

2 Pom. Eq. Jur. Sec. 836.

This doctrine has been recognized and applied by this Court in the cases of:

Holker vs. Parker, 7 Cranch. 436, and

Metcalf vs. Williams, 104 U. S. 93.

Nealis vs. Dix 72 Ind. 374.

Cochran vs. Eldridge, Penn., 5 Am. L. R. 162.

Ross vs. Wood, 70 N. Y. 8.

2. Pom. Eq. Jur. Secs. 914, 919.

Freeman on Judgments, Secs. 489, 490, 491 and 492.

And it has been held that it makes no difference that there was a legal remedy.

Babcock vs. McCannatt, 53 Ill. 214.

Cochran vs. Eldridge, Supra.

It is true that law courts will set aside judgments abtained by fraud on motion, but it is an exer-

cise of equitable principles, and they began to do so only after the equity jurisdiction became well established. It follows that the exercise of these equitable principles by the courts of law does not abrogate the original jurisdiction of courts of equity.

Cochran vs. Eldridge, Supra.

2. Whatever may be the rule with respect to judgments at law, it has never been questioned that a court of equity will relieve against a decree obtained in such court by fraud. The application is made by an original bill in the nature of a bill of review. Mr. Freeman, in his valuable work on judgments, lays down the rule thus:

"In the case of a decree in equity, the court may set it aside during the term in which it was entered. If however, the term has expired, and it is sought to impeach the decree for fraud, collusion and the like, the remedy is by an original bill in the nature of a bill in review, which may be filed without leave of the court."

Freeman on Judg., (3rd Ed.) Sec. 484 a.

The jurisdiction of courts of equity to set aside a decree obtained by fraud by an original bill filed for that purpose, has long been unquestioned.

Wright vs. Miller, 1 Sanf. Ch. 103.

In *Whittemore vs. Coster*, 3 Greene's, Ch. 438, the rule is quoted as laid down by Judge Story in his Equity Pleadings, in the following language:

"There is no doubt of the jurisdiction of courts of equity to grant relief against a former decree where the same has been obtained by fraud and imposition; for this will infect judgments at law and decrees of all courts; but they annul the whole in the consideration of courts of equity. This must be done by an original bill; and there is no instance of its being done by petition, though it seems once to have been thought that a decree as well as an interlocutory order could be set aside for fraud by petition only. Where a decree has been so obtained, the court will restore the parties to their former situation whatever their rights may be."

The doctrine here stated finds support in the decisions of this court:

Terry vs. Commercial Bank of Alabama, 92, U. S. 454.

United States, vs Throckmorton, 98 U. S. 61.

It appears from undenied allegations of the complaint as well as from the findings of fact, that the issue determined by the decree in the original case was

an equitable one, made so by Cowley's counterclaim, wherein he prayed for a specific performance of his contract of purchase of the real estate in question. This was the only controversy in that case, and the judgment or decree dismissing his counterclaim and denying him all relief therein prayed is the decree of a court of equity. This case was begun in the same court to set aside that decree because the same was unauthorized and was procured by fraud. We, therefore, submit that, if the petition is to be construed as an original bill in equity, and not a proceeding under the statute, it falls within the rule here contended for.

VI

ATTORNEYS AT LAW HAVE NO AUTHORITY TO COMPROMISE A CLIENT'S CAUSE.

1. We apprehend that it will not be seriously contended that the decree in question was entered with authority, or that it is a fraud in law, at least, upon Cowley's rights. Speaking of the stipulation upon which it was entered, the circuit court says: "The stipulation that was signed by Ganahl & Hagan, as attorneys for Mr. Cowley, was not only unauthorized, but it was made in defiance of his known wishes in the matter. The judgment rendered on that stipula-

tion was, therefore, improperly rendered and it was unjust. I have no hesitation in saying that if the judgment were moved against in any proper way, it should, as a matter of right, be vacated." Record page 33. A perusal of the findings of fact and the evidence will show that the court in the use of language above quoted, put the case very mildly. The negotiations between Mr. Cowley and Mr. Schulze at the residence of the former, on May 10th, 1888, looking to a settlement of the case somewhat on the lines of this stipulation, had never been closed. The propositions of settlement were inequitable and never satisfactory to Mr Cowley, and he was only led to consider them at all seriously by the advice of his attorneys, which he afterwards became distrustful of. The value of the land in controversy, at the time the judgment was rendered, is alleged in the complaint to be $120,000.00, and this is undenied by the answer, while the evidence shows it to have been worth about double that amount. R. p. 142 to 148. At the time the judgment was entered on May 21st, 1888, the case was pending before the referee appointed to take the evidence, and that day had been fixed by her, on motion of Ganahl & Hagan, for the taking of the test-

mony. That fact was known also to Mitchell, attorney for the company. Three or four days prior to this Cowley had discharged or attempted to discharge Ganahl & Hagan, and negotiations were pending between them for a settlement of their fees, all of which was known to Mitchell. In this state of the case, the attorneys went into court and filed the stipulation, without Cowley's knowledge or consent, and falsely represented to the court that the stipulation had been performed and the $8,000.00 therein mentioned paid over to Cowley, and thereupon procured the entry of the judgment. In point of fact, the money never has been paid over, and is still in the hands of Glover, as the agent of the company. Our contention is that the facts show a case of actual fraud. This, however, is not necessary. It is enough that the entry of the judgment was without authority from Cowley, and has resulted in injury to him. That it was injurious to him appears from the fact that the judgment deprives him of his property and gives him nothing. The possession of all the land, except about seven and one-half acres, is decreed to the company and Cowley is not even given judgment for the $8,000.00 or any part of the land, nor has he ever received or been

tendered, either at the time of the rendition of the judgment, or since, any part of the money or land, or any deed certificate or paper evidencing his right or title to any part of the land. The proposition was inequitable, even if he had got all that was offered, for he was only to have $15,000 or $20,000 out of property worth a quarter of a million dollars.

An early decision of this court, the opinion being delivered by Chief Justice Marshall, is conclusive of this case both upon the question of authority of attorneys to compromise their client's cause, and the jurisdiction of Federal courts to set aside judgments and decrees entered upon the unauthorized stipulation of attorneys. The judgment set aside in that case was one at law, in an action of debt. The facts were that the attorneys for the respective parties agreed that the matters in issue might be referred by the court to referees to make a report as to the accounts between the parties. The reference having been ordered, the attorneys agreed that the referees should award $5000 to the plaintiff in full of all demands. The award was made in accordance with this agreement, and judgment on the award was entered for the plaintiff. The judgment was satisfied by payment to the plaintiff's

attorney; but on being informed of these facts, the plaintiff repudiated the transaction on the ground that his attorney had exceeded his authority, and commenced an action to set aside the award and the judgment and for an accounting. At the trial there was no proof of fraud or collusion on the part of the attorneys, but it appeared that a much larger sum was due the plaintiff than was awarded by the referees. It was held that the judgment ought to be set aside on the ground that the agreement between the attorneys as to the amount to be awarded by the referees was, in effect, a compromise, and not simply an award; and that the plaintiff was not bound by the compromise, and the judgment in pursuance thereof, on the ground that the plaintiff's attorney had exceeded his authority.

In *Preston vs. Hill*, 50 Cal. 43, it is held that an attorney at law merely by his retainer as such, has no power to compromise an action, and consent to an entry of the judgment in accordance with the stipulation, if his client, with the knowledge of the adverse party, objects.

In the circuit court it was suggested that we have a statute in Washington enlarging the powers of at-

torneys at law, and that the stipulation in question was authorized under that statute. This suggestion is fully met by the California case just cited. Substantially the same statute was under consideration in that case. The court say, Crockett, Chief Justice:

"As I construe the statute it is only declaratory of the common law rule, except in so far as it provides that the 'agreement' by which an attorney may bind his client in any step in the action, 'shall be filed with the clerk or entered upon the minutes of the court'. It was not intended to enlarge or abridge the authority of the attorney; but only to prescribe the manner of its exercise by requiring the agreement to be filed with the clerk and entered on the minutes." *70 Cal. 53.*

In *Smith's Heirs vs. Dickson*, 3 Met. (Ky.) R. 438, the facts were that the plaintiff employed an attorney to prosecute an action in equity for the recovery of a valuable tract of land claimed by the defendants and in their possession. While the action was pending, the plaintiff's attorney entered into a compromise whereby in consideration of a sum of money paid by the defendants, it was agreed that a decree be entered in favor of the defendants quieting

their title as against the plaintiff and dismissing the complaint. The decree was accordingly entered, reciting on its face that it was entered by consent. On being informed of the facts, the plaintiff brought an action to set aside the decree, on the ground that the attorney exceeded his authority in entering into a compromise; and this view was sustained by the court of appeals. Peters, Justice, in delivering the opinion of the court after reviewing the authorities, says:—"The general question of the authority of an attorney has often been discussed in courts of justice, but it has not been held in any of them that an attorney who is clothed with no other authority than what is incident to his retainer, can compromise and discharge his client's claim."

2. The transactions and negotiations had at the residence of Cowley on the night of May 10th, 1888, between him and Schulze, in the presence of the attorneys, did not amount to a valid and binding agreement of settlement. The circuit court was of this opinion, for it says: "However, there was only an understanding between the patries as to the terms upon which the contract would be concluded' and there was not a contract actually made and conlcuded." It is true

that the terms of settlement, with minor details to be provided for, were substantially agreed upon. But that those terms were not considered to be binding upon either party until the papers should be prepared and executed is perfectly evident from the findings of fact and the evidence. Testimony of Hagan, R. p. 111-2-3; Schultze's testimony, R: p. 123-4. Mr. Schulze was requested to put his propositions in writing, but this he declined to do. Schultze's testimony, R. p. 119. It is also evident from the telegraphic correspondence which passed between Cowley and Mitchell on May 18th, that the latter did not understand that any binding contract of settlement had been made. Record page 37. In Mitchell's telegram to Cowley of that date, he says: "Mr. Schulze, my principal witness depending on your word, since broken, has made engagements making it impossible for him to go to Spokane Falls in this case for several weeks. The case will not go on until he can go; this you may depend on. If you must have a fight you shall have it."

The case of *Ambler vs. Whipple*, 20 Wall, 546, was a bill for an accounting between partners. It was contended by the defendant that the complainant had sold and released to the defendant all his interest in

the partnership business and the patent involved. The instrument by which it was contended this had been effected was prepared by Whipple for signature by Ambler, with whom he had fallen out and quarrelled, and contained mutual releases and assigments, each being the consideration of the other. Ambler, who never signed it, took from Whipple, without objection from the latter, an unsigned counterpart of the agreement, after Whipple had signed the first counterpart, and had left it in the hands of a third party to be delivered only when the unsigned counterpart was signed and delivered by Ambler. When Ambler received the second counterpart he promised to sign it, but never did so. The court commenting upon the facts says:

"Admitting all this to be true, it is very clear that both parties intended to have a written contract signed by each, as the evidence of any contract they might make on that subject, and neither considered any contract concluded until it was fully executed. Under these circumstances, Ambler had a right to decline to sign the paper, and until he signed he was not bound by it. This transaction does not, in our opinion, es-

tablish any release or transfer of Amblers' interest in the partnership concern." Page 546.

Moulton vs. Jershaw, 59 Wis. 316. (48 Am. R. 516.)

McDonald vs. Owings, 43 Mich. 394, (38 Am. R. 199.)

But even though a binding contract of settlement was made between Cowley and Schulze, it was not within the authority of the attorneys to undertake to compel him to perform it, after they had notice that he would proceed no further with it. Otherwise, we would have the strange spectacle of a man being forced to perform a contract without being brought into court for that purpose, and without any judicial inquiry as to the facts or merits of the case. The proposition is too plain for argument.

VII.

APPELLANT'S COUNTERCLAIM.

The sufficiency of appellant's counterclaim, as set up in the original action, and also set forth in his petition in this case, at pages 6, 7 and 8 of the record, has never been called in question during this litigation, and we presume no such question will now be raised. That the facts therein set forth entitle appellant to a decree for specific performance of his contract with the respondent, and entitle him to a deed

conveying him fee simple title in the land in dispute, there can be no doubt. We deem it unnecessary to cite authorities upon this proposition, but it will refer the court, without comment, to a single case directly in point. *Boyd vs. Brislin*, 55 Cal. 427.

VIII.

CONCLUSION.

As heretofore seen, in the statement of the case, the case was submitted to the court on appellant's motion to modify the referee's report by restating the conclusions of law in appellant's favor, and modify certain of the findings of fact. Record page 28. The court, although finding the merits of the case with the appellant, and in effect finding that the conclusions of law as stated by the referee were wrong, but being of the opinion that appellant had mistaken his remedy by failing to proceed under the statute, refused to restate the conclusions of law, and dismissed appellant's bill, without giving him an opportunity to show merits in his counterclaim. This, no doubt, was correct practice, if the court was right in holding that appellant had mistaken his remedy. We earnestly insist, however, that the court was wrong in so holding, and that the judgment dismissing the bill should

be reversed, with instructions to the circuit court to inquire into the merits of the counter-claim and, if merits are found therein, to set aside and vacate the original judgment and decree, and enter a decree in favor of appellant according to the equities of the case.

Respectfully submitted,

LEWIS ABRAHAM,

Counsellor and Solicitor for Appellant.

GEORGE TURNER,

FRANK GRAVES,

R. B. BLAKE AND

W. M. RIDPATH,

Of Counsel.

FILED.
APR 25 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

H. T. COWLEY,
Appellant,

against

THE NORTHERN PACIFIC RAILROAD COMPANY,
Appellee.

No. 342.

Appeal from United States Circuit Court, Washington.

BRIEF FOR APPELLEE.

A. H. GARLAND,
WILLIAM J. CURTIS,
Attorneys for Appellee.

The Evening Post Job Printing House, New York.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1894.

H. T. COWLEY,
Appellant,

against

THE NORTHERN PACIFIC RAILROAD COMPANY,
Appellee.

No. 342.

BRIEF FOR APPELLEE.

Statement.

This is an appeal from a decree of the Circuit Court for the District of Washington. The facts are as follows:

In 1886, the Northern Pacific Railroad commenced an action against the appellant to recover possession of certain lands, in the District Court of the Fourth Judicial District of Washington Territory. The appellant, by his answer in that action, counterclaimed the specific performance of a contract to convey to him the land in question. He employed as attorneys Messrs. Ganahl & Hagan, who were to receive as compensation a quarter of his recovery, whether in land or money. At the November, 1887, Term the case was referred, and the date set by the Referee for a hearing was May 10, 1888, which was afterward adjourned to May 11. On the day originally set for the hearing, the general land agent of the railroad company made an

offer to appellant's attorneys for a compromise of the suit by the payment to appellant of eight thousand dollars in cash and the conveyance to him of about seven and one-half acres of the land in question, the company to retain the remainder of the land. This offer appellant's attorneys advised him to accept, and after considerable discussion of the matter, in which the land agent of the railroad company and its attorney, as well as the appellant and his wife and their attorneys participated, the offer was accepted, the money and papers to be sent to the president of the First National Bank of Spokane Falls and to be delivered to the appellant or his attorneys. A quit-claim deed was to be executed by appellant and his wife for the part of the land which was to be retained by the railroad company, and the railroad company was to pay all the costs. Nothing was said as to how the suit should be disposed of, except that the attorneys were to attend to that matter.

It was supposed that the money and papers would arrive at Spokane Falls about May 16th, and they were received upon that day; but on the 15th of May appellant informed his attorneys that he was dissatisfied with the settlement and that he desired to employ other counsel with them, to which they refused to consent, except upon payment of their fees, and negotiations upon this subject were begun between them and appellant. On May 15th, appellant also telegraphed the general land agent of the railroad company that he must have additional time to consider the proposition of settlement, to which the land agent replied that there was nothing to consider, the settlement having been made and the papers and money sent.

The president of the First National Bank of Spokane, upon receiving the money and papers on May 16th, took them to the office of appellant's attorneys and informed them that upon the execution of the quit-claim deed by appellant and his wife the money would be paid over, and

he was informed that the matter would be attended to upon that day; but afterward, upon the same day, appellant and his wife refused to execute the deed, and have ever since refused, and the money has ever since been in the hands of the president of the bank ready to be turned over.

On May 17th appellant wrote to the attorney for the railroad company and to its general land agent a letter stating that the offer was not accepted, that Ganahl & Hagan were no longer his attorneys, and that all further communications should be made through his attorneys, Messrs. Blake & Ridpath. These letters were respectively received about May 19th and were answered to the effect that until other attorneys were regularly substituted by an order of court Messrs. Ganahl & Hagan would still be recognized by the defendant as appellant's attorneys. On the same day on which he wrote these letters, appellant also wrote Ganahl & Hagan, stating that he discharged them as his attorneys and that he had employed other counsel, to which they immediately replied that they demanded four thousand dollars for their fee, and would take nothing less, and that they had, on motion, set down the case to take testimony on Monday, May 21st. On May 18th the Referee set down the case to take testimony on May 21st, and notified the attorneys for the respective parties. Appellant telegraphed the attorney for the railroad company that he could not go on on that day, as he had employed new counsel, and the attorney for the railroad company replied that he had made no arrangements for taking testimony, having supposed that it would be unnecessary, and that, at any rate, he could not go until the general land agent of the company was able to attend. On May 21st, which was the first day of the May Term of the Court, the attorney for the railroad company and Ganahl & Hagan, as attorneys for Cowley, entered into a stipulation to the effect that the case had been settled and compromised on the terms

mentioned above, and that judgment should be entered for the plaintiff for the restitution of the premises demanded in the complaint, denying the relief prayed in defendant's answer, with costs against the plaintiff. Ganahl & Hagan also executed a receipt for the papers and money, then in the First National Bank, but they never received the money, which is still on deposit, as before mentioned. Upon this stipulation and receipt, which were filed, judgment was entered accordingly. Appellant did not know that the stipulation had been made or the receipt given or judgment entered, until it had been done, and upon hearing of it, he objected to it; but when the judgment was entered Ganahl & Hagan were his duly authorized attorneys in the case.

Thereafter, and without taking any further proceedings in the suit of the Northern Pacific Railroad Company against Cowley, appellant brought this action to set aside the judgment in the former case, upon the ground of fraud and collusion between Ganahl & Hagan and the attorney for the railroad company, and as being entered without authority. The action was begun in the District Court of of the Territory, and was afterward proceeded with in the Superior Court of Spokane County, in the State of Washington. It was then removed into the Circuit Court, which rendered a decree dismissing the bill from which this appeal is taken.

POINTS.

I.

Plaintiff shows no case for the interposition of a court of equity.

The principles governing courts of equity, where their aid is invoked to enjoin or set aside judgments at law, is well settled. In the leading case of

Marine Ins. Co. of Alexandria v. *Hodgson*, 7 *Cranch*, 332,

Mr. Chief Justice Marshall stated the law in language which has often been quoted and relied upon, as follows:

> "Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a Court of Chancery. On the other hand, it may with equal safety be laid down as a general rule that a defense cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that Court that the defense ought to have been sustained at law. In the case under consideration the plaintiffs ask the aid of this Court to relieve them from a judgment on account of a defense, which, if good anywhere, was good at law, and which they were not prevented, by the act of the defendants or by any pure and unmixed accident, from making at law."

The same rule was stated in

Hendrickson v. *Hinckley*, 17 *How.*, 443,

by Mr. Justice Curtis, in the following language:

> "A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law, because it did not amount to a legal defense or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents,"

and the rule was reaffirmed by this Court in

Crim v. *Handley*, 94 *U. S.*, 652, and
Brown v. *County of Buena Vista*, 95 *U. S.*, 157.

Courts of equity are always reluctant to interfere with judgments at law, and only do so to prevent an injustice which does not arise from the fault of the plaintiff in equity, and which a court of law could not have remedied. Their action is, moreover, almost invariably *in personam* and indirect. Their reluctance to interfere with judgments at law, directly, is so great that they will only do so in an extreme case. The rule is stated in

Black on Judgments, *Section* 357,

as follows:

> "The action of a court of equity in giving relief against a judgment at law is almost always indirect. Courts of chancery, it must be remembered, do not claim to exercise any supervisory power over the courts of law or their proceedings. Judgments are not reversed or vacated in equity. Adjudications at law are not overhauled or re-examined. It is to the party himself that the energies of the court of equity are directed, and its rem-

> edial power is exercised by putting restraint upon his usual liberty of following up his judgment by the appropriate process for its collection. Equity, therefore, acts on the *person*, not the proceeding; and while it will enjoin the *enforcement* of a judgment, in proper cases, it will not interfere with the judgment itself. Some of the cases hold that a court of equity cannot set aside the judgment of a law court and award a new trial. And indeed this is rarely done, if ever, in express terms."

In

> *Pomeroy's Equity Jurisprudence, Section* 1364 *n.*,

it is stated:

> "A judgment will not be enjoined for any defense or right which could be asserted in the court of law, unless such party can show (1) that he was prevented by fraud, mistake or accident from maintaining his legal rights; and (2) that the obstacle which prevented him could not have been overcome or avoided by any reasonable diligence or care on his part. These requisites are absolutely indispensable; the rule is inflexible."

It follows from this that wherever the party seeking the aid of a court of equity could, by any means, have obtained in a court of law, and in the original action, the relief which he seeks, equity will not interfere, but will leave him in the position in which he has placed himself by his failure to avail himself of the means of relief which were open to him in the original action.

These rules apply not only to such grounds of complaint as may arise from the party's failure to make, or to obtain proper advantages of, defenses or causes of action in the suit at law, but also to incidental matters relating to the conduct of the action which have affected the result. If relief might have been had in a court of law, in respect

of any of these matters, it will be a fatal objection to the bill, and equity will no more give the plaintiff the relief which he might have obtained by motion in the original action than it will enable him to avail himself of defenses or claims which he might there have set up.

This rule was forcibly stated by Lord Chancellor Redesdale in

Bateman v. *Willoe*, 1 *Sch. & Lef.*, 201.

There a bill was filed to set aside a judgment of the Court of Exchequer upon grounds which would have supported a motion for a new trial in that Court. The Lord Chancellor held that this fact was sufficient to prevent the interference of a court of equity, and said:

> "Then an application is made to the Exchequer for a new trial, which I understand to have been grounded on the same matters that are made the ground of the present suit, but the notice was too late and the Court refused a new trial. That Court had established a rule necessary for the purposes of justice, and being so, it would be contrary to those purposes if I should break through it. I should render that rule nugatory and defeat justice if in every case where the party has neglected to apply in due time to the court of law he should be at liberty to come into equity for a new trial. * * * There may be cases cognizable at law and also in equity, and of which cognizance cannot be effectually taken at law, and therefore equity does sometimes interfere; * * * but without circumstances of that kind I do not know that equity ever does interfere to grant a trial of a matter which has already been discussed in a court of law, a matter capable of being discussed there, and over which the court of law had full jurisdiction.
>
> Now, in this case, everything might have been discussed in a court of law, and the result must have been that the Court would have given judgment for the sum really due, and I see no ground for me to open this matter again. A bill for a new trial is watched by equity with extreme jealousy.

> It must see that injustice has been done, not merely through the inattention of the parties, but some such reasons as those I have mentioned must exist. Under these circumstances this bill must be dismissed, and with costs, for I think it unconscientious and vexatious to bring into a court of equity a discussion which might have been had at law."

The same rule was stated by Mr Justice Curtis in

Hendrickson v. *Hinckley*, 17 *How.*, 443,

cited above. One ground in that case upon which the plaintiff asked that the judgment be set aside by decree in equity was that he was surprised upon the trial. Mr. Justice Curtis says, after stating one answer to this ground of complaint:

> "Another answer is, that if there was surprise at the trial, a motion for delay, as is practised in some circuits, or a motion for a new trial, according to the practice in others, afforded a complete remedy at law."

In

Wilkinson v. *Rewey*, 59 *Wis.*, 554,

Mr. Justice Orton said:

> " The objection made by the learned counsel for the respondent, that a court of equity will not exercise jurisdiction in such a case is well taken. The two judgments, such as they are, are of record in the Circuit Court, and they could be set aside and vacated, and the executions recalled, upon motion in the two respective cases in that court, and a complete remedy had thereby at law, without asking the interference of a Court of Chancery in another suit. All possible and adequate remedies which may be obtained in one suit must be sought in that suit, rather than by another suit, either at law or in equity. This is an elementary principle."

In

Bibend v. *Krentz*, 20 *Cal.*, 109,

Mr. Justice Cope, with whom Mr. Chief Justice Field concurred, said:

> "The assistance of equity cannot be invoked so long as the remedy by motion exists."

In

Embry v. *Palmer*, 107 *U. S.*, 3,

which was a suit to enjoin a judgment, the Court said:

> "It thus appears that after the trial, and after the consequences of the failure of the defendants in error to make good the defence now relied on had become manifest, they had the opportunity to bring the very matter to the attention of the Supreme Court of the District, and did in fact appeal to its discretionary power to grant a new trial for reasonable and sufficient cause. The motion for a new trial was made March 17, 1873, was not overruled at a special term till April 19, 1873, and the appeal to the general term was not disposed of until October 27, 1873, and, in fact, owing to an irregularity in the entry of judgment, the verdict was under the control of the Court until September 28, 1874. During this interval there was ample time in which to present the facts and the application, and all illusions as to the intentions of the plaintiff in error had been dispelled by the trial and verdict. If it was not brought forward, it was from pure neglect. If it was, as it appears to have been, a court of competent jurisdiction has passed upon the very matter sought to be again litigated in the courts of Connecticut. The judgment of the Supreme Court of the District of Columbia refusing to grant a new trial was final. It was not, for that cause, subject to be reviewed on an appeal or a writ of error in any superior jurisdiction, and, for the same cause, it is not to be reviewed elsewhere."

In

White v. *Crow*, 110 *U. S.*, 183,

where an appeal was filed to set aside a judgment to enjoin the execution of a deed by the Sheriff upon a sale under a judgment which was alleged to be void, upon the ground that it was entered before the time to answer had expired, and upon consent of a person who acted as agent for the defendant, but who, it was asserted, was not authorized so to act, the Court, by Mr. Justice Woods, said:

> "But if he was not such agent, the question arises whether the rendition of judgment before the time for filing defendant's answer had expired renders the judgment void. We are of opinion that it does not; that its rendition was simply erroneous, and nothing more. The Court having jurisdiction to render the judgment, and having rendered it, the law, when the judgment is collaterally attacked, will make all presumptions necessary to sustain it. *Grignon's Lessee* v. *Astor*, 2 How., 319. The defendant being in Court, was bound to take notice of its proceedings, and might have corrected the error at any time during the term. It did not move to set the judgment aside. It filed no answer. The presumption, therefore, which the law makes is either that it consented to a submission of the case before the time for answer expired, or that it subsequently waived the error by not seeking to correct it."

If the rules laid down in the cases cited be applied to the case at bar, it will be seen that appellant shows no ground on which a court of equity can interfere. The facts as found, and as they appear upon the evidence, show clearly that in the original action the appellant, after careful consideration and considerable discussion, accepted an offer of compromise, which involved a judgment such as was rendered. This agreement was carried out by the railroad company, so far as it could do so, but

appellant desired to repudiate it, and refused to perform upon his part, or to accept the performance by the railroad company. He instructed the company that he had changed his attorneys, and instructed the attorneys themselves that he had done the same thing, but he took no steps to obtain a formal substitution, and, when the judgment was entered, his original attorneys were the only persons whom the Court or any party to the proceeding could recognize as attorneys for appellant in that action. These attorneys signed a stipulation, in accordance with appellant's agreement, on which judgment was entered, and it is of this judgment that he now complains. As was observed by the learned Judge below:

> "The plaintiff is in a court of equity, seeking purely equitable relief. He does not stand in a very good light in equity. It appears that he is not seeking to annul the action of the Court by which he claims important rights of his have been unjustly cut off, but the object of this suit is to reach beyond and cancel an agreement which he voluntarily made to compromise that case. Admitting that he was acting under the advice of his counsel, and that the advice given upon the questions of law involved was predicated upon an erroneous and unsound opinion, still, as I view the matter, considering the delays and uncertainty of litigation, no good lawyer would probably do less than Mr. Hagan did in advising Mr. Cowley as to the propriety and wisdom of accepting the proposition then made, and I cannot find that there was any bad faith on the part of plaintiff's attorney that would justify him in attempting to recede from his agreement made after deliberation and with a full understanding of the facts."

But if appellant were justified in his repudiation of his deliberate agreement, and if the entry of a judgment was in any respect improper, ample relief was open to him in the Court in which the judgment was entered. Under

the Code of Washington, in force at that time, *Section 436*, appellant might have obtained the vacation of the judgment for any irregularity in obtaining judgment, or for any fraud of the successful party practised in obtaining it. There was thus no reason why he should not have made his motion in that court. As was found by the learned Judge below:

> "The time allowed for making such motion did not expire until after this suit was commenced."

The appellant is, therefore, in the position of having deliberately refused to avail himself of his remedy at law, and having brought his suit to obtain from a court of equity the relief which it gives not only reluctantly and with great caution, but which a court of law might have and would have afforded him upon mere motion if he were really entitled to it and had chosen to ask it.

We submit that upon this state of the case there is no authority for granting appellant any relief in equity. It would be contrary to all the authorities to allow him to succeed, and he might as well have filed his bill to review the judgment below, for mere judicial error, as for the purpose for which he has filed it.

Nor, we submit, is there any evidence of fraud. Appellant's attorneys, who were still his attorneys of record when the judgment was entered, merely carried out the agreement which he himself had made. He had, indeed, notified them that he did not intend to keep his agreement, but that does not show any fraud in their conduct, even if fraud on their part would aid him now.

As to the railroad company, there is not the least evidence of fraud. They insisted upon the carrying out of the agreement which had been made by appellant with them, after full consideration and discussion, and as to the making of which we find no suggestion of fraud in the testimony.

Under these circumstances, we submit that the allega-

tions of the bill, even if they would make a case as a matter of law, have not been proved as a matter of fact. The appellant seeks the aid of a court of equity to enable him to repudiate his deliberate agreement, fairly made, and he further seeks, by a separate suit in equity, to obtain the relief which was perfectly open to him by a motion in the action at law. Upon no ground, therefore, was he entitled to succeed, and the decree of the Court below was right.

II.

The decree appealed from should be affirmed, with costs.

A. H. Garland,
William J. Curtis,
Attorneys for Appellee.